CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 392

WALTER E. MEYER, PETITIONER,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 31, 1945.

CERTIORARI GRANTED OCTOBER 22, 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

In the United States Circuit Court of Appeals For the Seventh Circuit

No. 8585

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

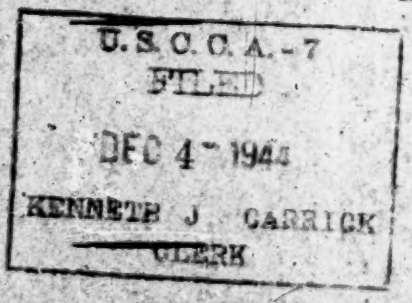
WALTER E. MEYER,

Appellant,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Appellees.



Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED MAY 15, 1944.
PRINTED RECORD.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8585

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Appellant,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Room in the City of Chicago in the Division and District aforesaid on the first Monday of February (it being the 7th day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-four, and of the Independence of the United States of America the 168th year.

Present:

Hon. John P. Barnes, District Judge.
Hon. William H. Holly, District Judge.
Hon. Philip L. Sullivan, District Judge.
Hon. Michael L. Igoe, District Judge.
Hon. William J. Campbell, District Judge.
Roy H. Johnson, Clerk.
William H. McDonnell, Esquire, Marshal.

Monday, February 7, A. D. 1944.

Court met pursuant to Adjournment.

Present: Hon. Michael L. Igoe, Trial Judge.

IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

In the Matter of
The Chicago, Rock Island and Pacific Railway Company,
Debtor. } No. 53209.

The following document was filed in the office of the general auditor Apr. 26, 1934.

IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

In the Matter of
The Chicago, Rock Island and Pacific Railway Company,
Debtor. } No. 53209.

PROOF OF CLAIM OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, AND WALTER E. MEYER, AND OTHER MINORITY STOCKHOLDERS OF SAID COMPANY, HEREIN DESIGNATED THE "CLAIMANTS", AGAINST THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

State of New York,
County of New York. }

WALTER E. MEYER, being first duly sworn, deposes and says that he resides at Pound Ridge, Westchester County, New York; that this deponent has been a director of St. Louis Southwestern Railway Company from June 1926 to June 1927, and also from June 1928 to date; that deponent is the owner outright and the holder of record

of over twelve thousand (12,000) shares of common stock of THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, which he has owned continuously for over six (6) years; that said claimant, St. Louis Southwestern Railway Company, is a corporation organized and existing under the laws of the State of Missouri, and owns and operates a railroad of one thousand eight hundred and eighty-five (1,885) miles extending through the States of Illinois, Missouri, Arkansas, Louisiana and Texas, and carries on business in the said states, and in various other parts of the United States; that this deponent is conversant and familiar with the matters herein set forth, and files this Proof of Claim on behalf of St. Louis Southwestern Railway Company, and as a stockholder of said Company in behalf of himself and other stockholders, because Southern Pacific Company, now in control of St. Louis Southwestern Railway Company, and the directors of St. Louis Southwestern Railway Company are liable as co-conspirators with THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY in connection with the facts hereinafter alleged; that the deponent, Walter E. Meyer, has not made demand upon the Board of Directors of St. Louis Southwestern Railway Company that they cause the St. Louis Southwestern Railway Company to file a Proof of Claim herein, because, by reason of the fact that Southern Pacific Company and the directors of St. Louis Southwestern Railway Company are liable as co-conspirators with The Chicago, Rock Island and Pacific Railway Company, such demand would be entirely useless and futile.

That said The Chicago, Rock Island and Pacific Railway Company was at and before the seventh day of June, 1933, and still is, justly and truly indebted to the said claimants in the sum of Thirty-One Million Five Hundred Ninety-Three Thousand Eight Hundred Seventy-Four ($31,593,874) Dollars.

That the said debt has arisen out of a claim against The Chicago, Rock Island and Pacific Railway Company by reason of its participation in a conspiracy, plan and scheme of control of St. Louis Southwestern beginning March 11, 1925, the participants in such conspiracy being The Chicago, Rock Island and Pacific Railway Company, Edwin Gould, now deceased, and certain holders of stock of St. Louis Southwestern friendly to the Rock Island whose identity is unknown to deponent. That the afore-

said Rock Island, Edwin Gould, now deceased, and certain other stockholders, controlled St. Louis Southwestern from March 11, 1925 until October, 1925.

That on or about October, 1925, the said Rock Island sold its dominant stock interest in St. Louis Southwestern to The Kansas City Southern Railway Company, and joining forces with The Kansas City Southern Railway Company, certain members of the firms of Kuhn, Loeb & Company and Ladenburg, Thalmann & Company, Leonor F. Loree, Charles Hayden, and others, entered into a conspiracy with the said members of the firms of Kuhn, Loeb & Company, Ladenburg, Thalmann & Company, Hayden, Stone & Company, The Kansas City Southern Railway Company, and other parties who thereafter joined the conspiracy, by which the conspirators controlled St. Louis Southwestern Railway Company through the ownership by The Kansas City Southern Railway Company, one of the conspirators, of the large block of stock of St. Louis Southwestern Railway Company sold by the Rock Island to the Kansas City Southern, and through the ownership of other stock of St. Louis Southwestern by other of the conspirators until April 15, 1929, and thereafter through the collusive holding, in behalf of the conspirators, of the controlling interest of stock of St. Louis Southwestern by New York Investors, Inc., Halsey, Stuart & Company, and others who joined the said conspiracy. That, included in the number of the conspirators, was Southern Pacific Company which first joined the conspiracy in June 1926, and later acquired large amounts of stock of St. Louis Southwestern.

That Charles Hayden, Chairman of the Board of Directors of the Rock Island, continued on the Board of Directors of St. Louis Southwestern for several years after the sale by Rock Island to Kansas City Southern, and actively participated in the control of St. Louis Southwestern by the conspirators.

That the acquisition by Rock Island of a dominant and controlling interest in the stock of St. Louis Southwestern from Edwin Gould on March 11, 1925, was in violation of Section 7, of the Clayton Anti-Trust Act and also of the Sherman Act, and the sale by the Rock Island to the Kansas City Southern caused the Kansas City Southern to violate the Clayton Act, and that the Rock Island, the Kansas City Southern, and others, violated the Sherman Act.

That the said holding of St. Louis Southwestern stock by Rock Island from March 11, 1925 to October, 1925, and the exercise of control in connection therewith, in the interest of Rock Island and without regard to the interest of St. Louis Southwestern and its stockholders, was in breach of the fiduciary relationship which the said Rock Island bore to the said St. Louis Southwestern, and was to the damage of St. Louis Southwestern in the amount of One Million, Three Hundred Forty-One Thousand, Nine Hundred Twenty-Eight ($1,341,928) Dollars.

That, as a result of the joining of forces of the conspirators, The Chicago, Rock Island and Pacific Railway Company, holders of stock friendly to the Rock Island, Edwin Gould, now deceased, with other conspirators, members of the firms of Kuhn, Loeb & Company, Ladenburg, Thalmann & Company, The Kansas City Southern Railway Company, Leonor F. Loree, and various others, St. Louis Southwestern was damaged in the amount of Twenty-Seven Million Seven Hundred Eighty-Four Thousand, Nine Hundred Forty-Six ($27,784,946) Dollars, by reason of control of St. Louis Southwestern by the conspirators from March 11, 1925 to June, 1933, and in damages under the Federal Anti-Trust Laws in three-fold that amount.

That the control of the St. Louis Southwestern Railway Company by the conspirators, The Chicago, Rock Island and Pacific Railway Company, Edwin Gould, now deceased, and certain holders of stock of St. Louis Southwestern friendly to the Rock Island from March 11, 1925 until October, 1925, was in the interest of the said conspirators, and entirely without regard to the interests of the St. Louis Southwestern Railway Company and its stockholders, and was in breach of the fiduciary relation which the said conspirators, including The Chicago, Rock Island and Pacific Railway Company, bore to St. Louis Southwestern Railway Company and its stockholders. That the control of the St. Louis Southwestern Railway Company, from October, 1925 until June, 1933, by the conspirators, The Kansas City Southern Railway Company, certain members of the firms of Kuhn, Loeb & Company, Ladenburg, Thalmann & Company, Leonor F. Loree, Charles Hayden, and others, in which conspiracy The Chicago, Rock Island and Pacific Railway Company participated, was in the interest of the said conspirators, and entirely without regard to the interests of the St. Louis

Southwestern Railway Company and its stockholders, and was in breach of the fiduciary relation which the said conspirators, including The Chicago, Rock Island and Pacific Railway Company, bore to the St. Louis Southwestern Railway Company and its stockholders.

That by reason of the sale by Rock Island to Kansas City Southern of its dominant and controlling interest in St. Louis Southwestern, amounting to One Hundred Thirty-Four Thousand, Eight Hundred Eighty (134,880) shares of preferred stock and Nineteen Thousand Three Hundred Eighty-Eight (19,388) shares of common stock, which sale was in breach of the fiduciary relationship which Rock Island had toward St. Louis Southwestern and in violation of the Anti-Trust Laws of the United States, the Rock Island realized a profit of Two Million, Four Hundred Sixty-Seven Thousand ($2,467,000) Dollars over and above the price paid by the said Company for the said stock, and for the difference between the price Rock Island received from the Kansas City Southern and the reasonable value of the said stock, and for the profits in the amount of Two Million Four Hundred Sixty Seven Thousand ($2,467,000) Dollars, the said Rock Island is accountable to the said St. Louis Southwestern.

That the said claim in the amount of $31,593,874.00 became due on the seventh day of June, 1933.

That no part of the amount due St. Louis Southwestern Railway Company by reason of the facts hereinabove set forth has been paid; that there are no offsets or counterclaims to the amount claimed herein; that no note or other written obligation was taken or received for or on account of said claim, or any part therefor, and no judgment has been rendered thereon or therefor. St. Louis Southwestern has not, nor has any corporation or person by its order, to deponent's knowledge or belief, or for the use of St. Louis Southwestern, had or received any manner of security for the amount due St. Louis Southwestern or on account of the liability to St. Louis Southwestern as hereinabove set forth, and that after allowance of all just credits, deductions and set-offs there is now due St. Louis Southwestern Railway Company from The Chicago, Rock Island and Pacific Railway Company the sum of Thirty-One Million, Five Hundred Ninety-Three Thousand Eight Hundred Seventy-Four ($31,593,874) Dollars.

That by reason of the facts hereinabove set forth deponent makes this claim.

That the reasons why this claim is not made by the St. Louis Southwestern Railway Company are hereinabove set forth.

Walter E. Meyer.

Post Office Address of Walter E. Meyer, a stockholder of St. Louis Southwestern Railway Company, who makes this claim as a stockholder of St. Louis Southwestern Railway Company in behalf of St. Louis Southwestern Railway Company.

31 Nassau Street, City of New York, County of New York, State of New York.

Subscribed and sworn to by the said Walter E. Meyer, before me, a Notary Public, this 24th day of April, 1934; and I do hereby certify that I am authorized under the laws of the State of New York to administer oaths.

Aloysius Brunner,
(Seal) *Notary Public.*

Notary Public, Queens County.
Queens Co. Cl'k No. 206 Reg. No. 4293.
N. Y. Co. Cl'k No. 123 Reg. No. 5B87.

My Commission expires Mar. 30, 1935.

The following Document was filed with the Special Master May 25, 1935:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

Claim of Walter E. Meyer, No. 88.

OBJECTIONS TO ALLOWANCE OF CLAIM.

To Jacob I. Grossman, Special Master:

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees herein, by their solicitors, present the following objections to the allowance of the above-mentioned claim or interest:

The Trustees deny that the amount claimed or any other amount is due to the claimant by reason of the facts alleged in the said statement of claim.

M. L. Bell,
Counsel for Trustees.

Dated May 7, 1935.

The following Document was filed with the Special Master, Jan. 16, 1936.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

Claim of Walter E. Meyer, No. 88.

NEW MATTER IN SUPPORT OF OBJECTIONS TO ALLOWANCE OF CLAIM.

To Jacob I. Grossman, Special Master:

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees herein, by their Solicitor, respectfully show to the Special Master:

1. The Trustees herein filed their objections with the Special Master to the allowance of this claim, or any part thereof, on May 21, 1935.

2. On December 12, 1935, the St. Louis Southwestern Railway Company filed in the District Court of the United States, Eastern District of Missouri, at St. Louis, Missouri, a petition for reorganization under Section 77 of the Bankruptcy Act. On January 3, 1936, the said Court held that the petition was properly filed; and on January 4, 1936, the said Court appointed Berryman Henwood, Esq., Trustee under Section 77 of the Bankruptcy Act, as amended. The effect of this action is to vest in the Trustee, Berryman Henwood, Esq., all causes of action vested in or belonging to the St. Louis Southwestern Railway Company, and by reason thereof the said claimant, Walter E. Meyer, may no longer maintain or assert his claim in this proceeding. The objections to the allowance of this claim should be sustained.

M. L. Bell,
Solicitor for Trustees.

Dated, January 15, 1936.

The following Document was filed with the Special Master July 22, 1941.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

Claim of Walter E. Meyer, No. 88.

ADDITIONAL MATTER IN SUPPORT OF OBJECTIONS TO CLAIM.

To Hon. Jacob I. Grossman, Special Master:

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees herein, respectfully submit the following additional matter in support of their objections to the foregoing claim:

1. On July 15, 1941, the Interstate Commerce Commission released its order as of June 30, 1941, in its Finance Docket No. 11040, being the Report of the Commission in the reorganization proceedings of St. Louis Southwestern Railway Company and the findings of the Commission with respect to such plan of reorganization. Walter E. Meyer, claimant herein, was an intervener in said proceedings and a party thereto. In connection with that proceeding, claimant, Walter E. Meyer, presented to the Interstate Commerce Commission all of the charges of conspiracy against the St. Louis Southwestern which are set out in the instant claim, and the Commission found that the evidence submitted by Meyer in support of such allegations did not sustain the contentions of conspiracy. A copy of the Commission's Report will be submitted to the Master and to the Court upon the hearing of such claim.

2. The Commission further held in said report that the reorganization proceedings of the St. Louis Southwestern excluded Meyer, as a stockholder, from bringing a derivative or representative suit in a court or courts of appropriate jurisdiction on his alleged causes of action on behalf of the St. Louis Southwestern, and the Commission further stated that it is implicit in such reorganization proceedings that the trustee in bankruptcy may bring such a suit, all in accordance with the statement of new matter filed herein by these Trustees under date of

January 15, 1936. The Commission's statement, page 73 of said report, is as follows:

"Meyer urges that an intent to prevent the reassertion of this cause of action was among the purposes of the Southern Pacific in causing the debtor to file its petition for reorganization, and thereby to vest in the reorganization trustee title to all property of the debtor, under the direction of the court. *But, while the reorganization proceedings exclude Meyer from bringing a derivative or representative suit in a court or courts of appropriate jurisdiction, if there is a cause of action, it is implicit in such reorganization proceedings that the trustee may bring suit.* The trustee has been authorized by the bankruptcy court to investigate and directed to report to the court any facts pertaining to irregularities, fraud, misconduct, or mismanagement as the result of which the debtor may have a cause of action; and he has investigated and from time to time reported to the court on such matters." (Italics ours.)

3. The Commission further found in its said plan of reorganization of the St. Louis Southwestern Railway Company that the stockholders of said company have no equity in the properties of the company; so that, if a recovery should be made on this claim, it would not be for the benefit of the stockholders, but for the benefit of the creditors of St. Louis Southwestern Railway Company; and said Meyer is not qualified, under any circumstances, to bring a claim or action on behalf of said creditors.

Respectfully submitted,

Otis F. Glenn,

Marcus L. Bell,

Solicitors for Rock Island Trustees.

Dated July 22, 1941.

The following Document was filed with the Special Master Dec. 27, 1941:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

Claim of Walter E. Meyer, No. 88.

Walter E. Meyer, claimant in behalf of St. Louis Southwestern Railway Company, FOR A REPLY to the objections contained in "New Matter in Support of Objec-

tions to Allowance of Claim" filed by the trustees for the above named debtor, dated January 15, 1936, and to the objections contained in the "Additional Matter in Support of Objections to Claim" filed by said trustees for debtor, dated July 22, 1941:

I. Denies each and every allegation contained in said objections dated January 15, 1936, except that claimant admits that St. Louis Southwestern Railway Company on December 12, 1935, filed in the District Court of the United States, Eastern District of Missouri, at St. Louis, Missouri, a petition for reorganization, and that on January 3, 1936, said Court held that said petition was properly filed and on January 4, 1936, appointed the Honorable Berryman Henwood trustee of St. Louis Southwestern.

II. Denies each and every allegation contained in paragraph "1" of said objections dated July 22, 1941, except that claimant admits that on July 15, 1941, the Interstate Commerce Commission released its order as of June 30, 1941, in its Finance Docket No. 11040, and that Walter E. Meyer, the claimant herein, was an intervener in said proceedings and a party thereto.

III. Denies each and every allegation contained in paragraph "2" of said objections dated July 22, 1941, except that claimant admits that the Commission's said report, page 73 thereof, contains the language set forth in said paragraph "2", and further alleges that the language set forth in said paragraph "2" does not refer to the claim herein but to the cause of action against Kansas City Southern and others set forth in the complaint filed by claimant as plaintiff in *Meyer* v. *Kansas City Southern, et al.*, as appears from the language at page 72 of the said Commission's report immediately preceding the quotation set forth in said paragraph "2". Said language on page 72 is as follows:

"The suit was dismissed by the District Court for want of jurisdiction, in *Meyer* v. *Kansas City Southern Ry. Co.*, 11 F. Supp. 937, opinion dated September 6, 1935; and, on appeal by the plaintiff from the decree dismissing the cause, the judgment was affirmed, June 22, 1936, by the Circuit Court of Appeals, Second Circuit, in *Meyer* v. *Kansas City Southern Ry. Co.*, 84 F. (2d) 411."

IV. Denies each and every allegation contained in paragraph "3" of said objections dated July 22, 1941, except that claimant admits that the plan of reorganization of St. Louis Southwestern approved by the Commis-

sion made no provision for the present stockholders of said company.

V. Alleges that the findings of the Interstate Commerce Commission in said report dated June 30, 1941, are not *res judicata* on the issues raised herein.

VI. Alleges that to the said report of the Interstate Commerce Commission hereinbefore referred to, Honorable Joseph B. Eastman, Chairman of said Commission, dissented in an opinion in which he differed to a very great extent from said majority report. Chairman Eastman showed that he was convinced that the evidence in said proceedings established certain facts, including, among others, that St. Louis Southwestern previous to control by competitors was the strongest financially of the Southwestern roads; that St. Louis Southwestern's downfall began with control by competitors, first by the Chicago, Rock Island & Pacific, the debtor herein, and then by Kansas City Southern Railway Company, to which company said Chicago, Rock Island & Pacific sold its then controlling stock interest in St. Louis Southwestern; that the anti-trust laws were violated by such control; that Kansas City Southern continued in control of said company until Southern Pacific acquired such stock control; that the motives that prompted Southern Pacific to acquire such control were open to question; that Southern Pacific breached its contract to solicit preferentially for St. Louis Southwestern and failed to obtain much traffic for St. Louis Southwestern which it could have obtained; that the reorganization proceedings of St. Louis Southwestern were unnecessary at the time they were instituted. It is expressly stated in said dissenting opinion that the downfall of St. Louis Southwestern began with the acquisition by Rock Island in March 1925 of a dominant stock interest in said St. Louis Southwestern without the authority of the Commission. A copy of said dissenting opinion of Chairman Eastman is annexed hereto and marked Exhibit A.

Claimant avers that the facts set forth in Chairman Eastman's dissenting opinion to a very large extent sustained his charges as to the conspiracies in which claimant charges that debtor, Chicago, Rock Island & Pacific, participated, and as a result of which St. Louis Southwestern was greatly damaged.

Claimant has in his possession a very considerable correspondence between officials of St. Louis Southwestern on the one hand, and officials of Rock Island and officials of Southern Pacific on the other hand, which indicate that Rock Island while in control of St. Louis Southwestern, conspiring with Southern Pacific, actively interfered in the traffic policies and practices of St. Louis Southwestern to the benefit of Rock Island and to the damage of St. Louis Southwestern, and allowed Southern Pacific to change its solicitation of traffic for St. Louis Southwestern to the advantage of the conspirators Southern Pacific and Rock Island, and greatly to the damage of St. Louis Southwestern, without any retaliation on the part of St. Louis Southwestern. Thereafter during the control of St. Louis Southwestern first by Kansas City Southern and subsequently by Southern Pacific, Rock Island was allowed by Kansas City Southern and Southern Pacific, greatly to the damage of St. Louis Southwestern, to retain the unfair, unjust and unlawful advantage Rock Island gained over St. Louis Southwestern during said period of direct control by Rock Island.

In addition to said correspondence, this claimant has in his possession other proof, including important, accurate, and as he believes, convincing statistical data which shows that St. Louis Southwestern lost in net railway operating income the amount set forth in the claim herein as a result of the conspiracy set forth in said claim.

VII. In support of the charge that acquisition by Rock Island of a controlling stock interest in St. Louis Southwestern was illegal, claimant refers to the proposed report of C. V. Burnside, Assistant Director of the Bureau of Finance of the Interstate Commerce Commission, issued August 12, 1925, F. D. 4809, recommending a denial of the application of the Rock Island to acquire stock control of St. Louis Southwestern under Section 5, Paragraph (2) of the Interstate Commerce Act. In said proposed report Assistant Director Burnside found that St. Louis Southwestern was competitive with Rock Island. Referring to previous statements in said report, Assistant Director Burnside, in the following language, reproved the Rock Island for acquiring stock control of St. Louis Southwestern without first having sought and obtained the authorization of the Commission to do so:

"It thus appears quite clearly that the applicant and the Cotton Belt are already proceeding to realize the benefits of common control in substantially the same manner as would have been followed if authorization under paragraph 2 of section 5 had been secured, and question arises as to the necessity or value of such authority under these circumstances" (Sheet 4).

On or about October 14, 1925, said Rock Island, without waiting for the Interstate Commerce Commission to pass upon the application of Rock Island for authority to control St. Louis Southwestern and the said proposed report of Assistant Director Burnside, sold its stock interest in St. Louis Southwestern to Kansas City Southern, which road was also keenly competitive with St. Louis Southwestern, and withdrew its application to the Commission for authority to control St. Louis Southwestern.

VIII. Alleges that on August 27, 1941, claimant filed a petition for reconsideration of said entire report of the Commission dated June 30, 1941, and of the said findings of the Commission referred to in the trustees' objections of July 22, 1941. That to date the Commission has not passed upon said petition, and on this account the findings in said report are not final findings by the Commission.

IX. Alleges that the fact that Walter E. Meyer, the claimant in behalf of St. Louis Southwestern, under the present plan formulated by the Commission, is not to receive securities of the reorganized company for the stock of the company which he now holds, does not prevent him as a stockholder from continuing to assert the said claim against Rock Island in behalf of St. Louis Southwestern.

X. Alleges that after the filing of the claim herein and before the adjudication by the United States District Court that St. Louis Southwestern was in need of reorganization and the appointment of a trustee for St. Louis Southwestern, claimant became the owner of $14,000 par value of the First Terminal & Unifying 5% Mortgage bonds of St. Louis Southwestern, which he has held continuously since that time, and that at present claimant is the owner of $30,000 par value of the Terminal & Unifying bonds and $30,000 par value of the General & Refunding bonds of St. Louis Southwestern. That if the Commission's present plan of reorganization of St. Louis Southwestern is put into effect, all classes of bondholders, including the Term-

inal & Unifying and the General & Refunding bondholders, will receive both bonds and stock in the new company.

Walter E. Meyer,
Claimant.
31 Nassau Street
New York City

Dated New York, N. Y.,
December 27, 1941.

EXHIBIT A.

Interstate Commerce Commission.

FINANCE DOCKET No. 11040.

St. Louis Southwestern Railway Company Reorganization.
Chairman Eastman's Dissenting Opinion.

A very large part of the report is devoted to a discussion of the allegations of Walter E. Meyer. His interest in the property of the debtor is not, however, clearly indicated. The evidence shows that he became a stockholder by the purchase of 3,900 shares of the common stock in 1920, and that he thereafter added to his holdings from time to time, so that he now owns 14,010 shares, representing an investment of nearly a million of dollars. This investment exceeds by many times the combined stock investment of all the present directors of the company. Under the plan of reorganization which has been approved, his entire investment, and that of all other common stockholders and preferred stockholders as well, will be wiped out. That he has been deeply concerned goes without saying.

Meyer has at times sold shares, but only a fraction of what he has bought. Clearly his purpose has been investment, not speculation, and whether or not his judgment as an investor has been good, certainly he has endeavored to discharge his responsibility as a partial owner of the property by close personal attention to its affairs. For seven years he served as a director of the company under the laws of Missouri which permit minority representation of stockholders. No dividends have been paid on the common stock since he became a stockholder. On the other

hand he has spent, not only a great amount of time, but a very considerable amount of money in fighting for what he conceived to be the best interests of the company, going so far at times as to employ operating and statistical experts at his own expense. At the further hearings, called to consider his allegations, he stood alone, against able and hard-hitting attorneys, and the briefs which he filed and which he wrote personally testify to what these hearings cost him in the way of labor. Whether he was right or wrong, his sincerity, perseverance, and courage can not, I believe, be seriously questioned.

The further hearings consumed much time and caused much expense, and they have delayed the debtor's reorganization; but this need not have been the situation. Meyer never claimed that he had complete proof of his allegations. What he wanted was a thorough investigation made by and with the resources of this Commission, and he believed that he had sufficient evidence to warrant us in undertaking such an investigation. On November 18, 1935, within 6 days after the filing of debtor's reorganization petition, he presented his request for an investigation to Division 4. We have in the past made such investigations of railroads which have gone into receivership or bankruptcy. *Denver & Rio Grande Investigation*, 113 I. C. C. 615; *Chicago, Milwaukee & St. Paul Investigation*, 131 I. C. C. 615; *New York, New Haven & Hartford Investigation*, 220 I. C. C. 505. Meyer was told that in view of the opportunity that would be presented in the consideration of debtor's plan of reorganization "to investigate all phases of its traffic problems and relations with other carriers," the Commission would not be justified in "undertaking now a separate inquiry."

However, at the hearings on the reorganization plan, Meyer endeavored to present of record much documentary evidence and testimony bearing on the matters which he wished to be investigated, but he was not permitted to do so. He thereupon filed with the Commission on April 12, 1937, a formal petition for the investigation, and an amended and supplemental petition was filed on June 21, 1937, in which a large group of bondholders joined. The Commission denied this petition on July 12, 1937. With two other Commissioners I voted to grant it. Some months after the case had been argued and submitted, it was, on

January 10, 1939, reopened to give Meyer an opportunity to present his evidence.

By way of contrast, the New York, New Haven & Hartford Railroad Company filed a petition for reorganization on October 23, 1935. On November 12, 1935, we instituted an investigation into its "history, management, financial and other operations, accounts, expenditures of carrier funds in other than common-carrier operations, and practices," although no request for such an investigation had been presented. This investigation required a detailed investigation of that railroad's accounts, records, and files and of those of numerous subsidiary companies. It is a much larger railroad than the debtor. That investigation was completed and a voluminous report issued on April 5, 1937, when the hearings in the present proceeding were just beginning. If the investigation which Meyer sought had been instituted when he first presented his request in December, 1935, it could have been completed well in advance of the reorganization hearings, and the results would, I believe, have been much more satisfactory for all concerned.

When Meyer made his first purchase of debtor's stock, the financial prospects of this railroad seemed very good indeed. In his report to us on "Consolidation of Railways" in 1921, Professor William Z. Ripley referred to it as the "strongest financially of all these southwestern properties," 63 I. C. C. 455,624. Its earnings on common stock from 1921 to 1929 were these: 1921, $9.16; 1922, $7.72; 1923, $14.71; 1924, $8.38; 1925, $8.47; 1926, $8.63; 1927, $5.22; 1928, $4.68; 1929, $0.64. It will be noted that the earnings for most of this period were excellent. No dividends were paid, but the stockholders were told that the earnings were being used for the improvement of the property and were laying the foundation for future dividends. Beginning with 1927, however, the earnings began to break until by 1929 they had almost disappeared, although the country was still in a state of apparent prosperity.

This downfall began not long after changes had occurred in the control of the property. The Rock Island acquired a dominating stock interest (without authority from this Commission) in March, 1925, but sold it in October of the same year to the Kansas City Southern, in connection with a scheme of the latter to bring the debtor and the Missouri-

Kansas-Texas under common control with itself. Unsavory incidents of the project and the resulting stock-buying campaign were the profits of $536,568, $144,708, and $144,708 made, respectively, by the bankers of the Kansas City Southern, Kuhn, Loeb & Company and Ladenburg, Thalmann & Company, and the chairman of its board, L. F. Loree, in trading in the stocks on their own account (Loree later made restitution). In *Unification of Southwestern Lines*, 124 I. C. C. 401, the Commission on May 3, 1927, refused to approve the acquisition of control of the two other railroads by the Kansas City Southern. The report pointed out that the latter had secured "practical control" of the other railroads before the application was filed, and stated that the "acquisitions of stock above described, without our approval, appear to have constituted violations of section 7 of the Clayton Anti-Trust Act and perhaps also of the Sherman Act." It also pointed out the possibilities of abuse inherent in the situation through diversions of traffic from the St. Louis Southwestern and the Missouri-Kansas-Texas.

In February, 1928, the Commission instituted proceedings under the Clayton Act against the Kansas City Southern. Thereafter, on July 8, 1929, it discontinued the proceedings, finding in *Interstate Commerce Commission v. Kansas City Southern Ry. Co.*, 156 I. C. C. 359, that respondent had divested itself of the unlawful holdings. However, five members of the Commission, of whom I was one, dissented from this conclusion. Most of the stock of debtor which the Kansas City Southern held was sold to a syndicate headed by New York Investors, Inc. In view of the character of this syndicate and various affiliations of its members, I was not satisfied that the Commission had done all that it could and should have done to make sure that the Kansas City Southern interests had parted with actual control, direct or indirect, over debtor. The reasons for this conclusion I stated at length in a dissenting opinion, and there is nothing in this record which would lead me to change anything that I then said. Thereafter, on March 17, 1930, Mortiz Rosenthal, head of the firm of Ladenburg, Thalmann & Company, went on the board of directors of New York Investors, Inc.

On March 18, 1930, Meyer and other minority stockholders of debtor filed with us a petition seeking a reopening of the Clayton Act proceedings. While this peti-

in this case the condition was only that it should agree to exchange one share of Southern Pacific stock for three shares of debtor's common stock and three shares of Southern Pacific stock for five shares of debtor's preferred stock. At the time of the argument of the case, on November 14, 1931, this was said by Southern Pacific counsel to amount to about $30 per share for the preferred and $16.67 per share for the common. Even on July 15, 1930, the date of acquisition of the stock held by New York Investors, Inc., when Southern Pacific stock was selling at $119 per share, the basis of exchange would have been equivalent to only $71.40 for the preferred and $39.67 for the common.

In a dissenting opinion I expressed the opinion that the prices paid were "excessive and ought not to be approved as just and reasonable." Among other things I called attention to the fact that in *Unification of Southwestern Lines, supra*, we found that in October, 1925, the Kansas City Southern had bought 134,880 shares of debtor's preferred from the Rock Island at $92 per share and 19,288 shares of common at $60 per share. We stated that "these prices, particularly that for the preferred, were considerably above the market." Later, 120 shares of preferred were bought in the market at an average price of $73.696 per share and 712 shares of common, at an average of $53.677 per share. The whole lot of 155,000 shares was to be transferred by the Kansas City Southern to the Missouri-Kansas-Texas at cost. We found that the "price paid and to be paid for the Cotton Belt preferred stock seems to be too high." In 1925, according to its reports, debtor earned $8.47 per share on its common stock. In 1929, it earned 64 cents per share. In 1930, its deficit was $8.38 on common and $2.24 on preferred. These facts speak for themselves.

In justification of the purchase, the Southern Pacific cites the following paragraph from *St. Louis S. W.-Ry. Co. Control, supra*, pages 181-2, stating its contentions at that time:

"While all of the so-called northern lines remained "free agents" the applicant was content to continue operating under the then existing conditions and to remain a strictly Texas and Louisiana system, interchanging business with all connections at the north Texas and Louisiana gateways. Because of the fact, however, that other strong

systems which have lines to the Mississippi River gateways, have also, by acquisition and control, extended their lines into Texas in competition with the applicant, and the further fact that under our consolidation plan all north-and-south lines, including the Cotton Belt, have been assigned to other systems, the applicant considers it imperative that it protect itself in the competitive field by assuring the continuance indefinitely of the movement of its Texas traffic over a noncompeting line. The Cotton Belt is the only line of that character now unaffiliated with a competing system, and fear is expressed that once it is lost to another system the applicant will permanently be "bottled up" in Texas and Louisiana."

This statement was not amplified. The Missouri Pacific had, by acquisition and control, extended its lines into Texas, but that had been done as far back as 1925. In the same year the Illinois Central, by acquisition and control, had extended its system to Shreveport, La. I know of no other like instances. Nor was debtor the only north-and-south line then "unaffiliated with a competing system." The Missouri-Kansas-Texas and the Kansas City Southern had no such affiliations. Nor did the Rock Island and the Frisco, unless the latter's minority stock interest in the former could be so characterized.

On the assumption that there was this urgent need, suddenly discovered, to gain control of debtor, the Southern Pacific undertakes to justify the price paid by intimations that other interests were seeking to purchase and the stock could not be got for less. Thus Hale Holden testified that there were reports that the Van Sweringen interests were seeking to acquire debtor, or, as he put it, "that the Missouri Pacific System already in operation under the Van Sweringen direction was to be duplicated by the Chicago & Eastern Illinois, Cotton Belt, down into the Southwest, *practically monopolizing in the same interest by those two systems, the whole territory*" (emphasis supplied). This suggestion answers itself. Assuming that the Van Sweringens in the middle of 1930 could have raised the necessary cash, surely they would not have been so rash, especially in view of the experience of the Kansas City Southern, as to have acquired the debtor, which is paralleled on both sides by the Missouri Pacific, in plain defiance of the anti-trust statutes.

Meyer testified that Holden at the time mentioned the

Pennroad Corporation (the other "villian" of the period) as a possible purchaser. In view of the amount of money which it had already squandered in purchases of railroad stocks, I do not for a moment believe that in the middle of 1930 the Pennroad Corporation could have raised the cash necessary for the purchase of debtor's stock, even assuming that it would have gone so far afield for a foolish venture. But supposing that I am wrong about this, what was there in such a prospect to scare the Southern Pacific? The Pennroad Corporation was the creation of the Pennsylvania Railroad, located far from Southern Pacific territory, and its bankers, Kuhn, Loeb & Company, were also the bankers of the Southern Pacific. In fact the only sizeable profits which have ever resulted from its operations by any one connected with the Pennroad Corporation went to Kuhn, Loeb & Company.

The explanations of the acquisition of debtor's stock at the time when it was acquired and at the price paid do not explain. I could make logical surmise as to the reasons for the transaction, but it would be only a surmise. It is enough to say that no adequate reasons have ever been given.

In presenting evidence in support of the application to acquire control of the debtor, both the Southern Pacific and the debtor emphasized the benefit which they would receive from making the latter a part of the Southern Pacific System. As stated in *St. Louis S. W. Ry. Co. Control, supra*, page 206:

> The principal benefit to the public will arise from the inclusion of the Cotton Belt as a system line with the Texas & New Orleans. Such a unification will insure a strong competitor for the Missouri Pacific in the Rio Grande Valley and will permit system handling of traffic to and from important Texas points from and to Memphis, St. Louis, and points beyond. The Cotton Belt must depend principally upon bridge traffic for its continued existence, and the applicant is best situated and constituted for furnishing such traffic. At the same time, the communities served by the Cotton Belt will, under Southern Pacific control, be assured of a strong transportation system.

As debtor then stated on brief:

> "There need be no pussyfooting about the effect of this unification. If the application is granted, it is inevitable

that the Southern Pacific will endeavor to put its eggs in the Cotton Belt basket just as far as it can—and it cannot do so without affecting other of its northern connections."

These northern connections, including the Rock Island, the Missouri-Kansas-Texas, the Frisco, and the Missouri Pacific, were all very fearful of this result, and they opposed the acquisition strenuously. For example, as shown on page 199 of the report above cited, the Frisco argued—"that a vast amount of freight moves between the eastern and southern defined territories on the one hand and Texas, the lower intermountain States, the Pacific coast, and Mexico on the other hand, with interchange at the St. Louis and Memphis gateways; that the entrance of the applicant to those gateways will inevitably divert a considerable volume of such traffic from the so-called strictly southwestern lines now serving St. Louis and Memphis;"

It further argued—

"that a system with gathering lines radiating in every direction from its main stem and extending from the Pacific coast to a Mississippi River gateway has a great advantage over any system whose lines terminate in the interior, and that if such system serving the Pacific coast and a major Mississippi River gateway [New Orleans] be permitted to extend its line so as to serve three such gateways [New Orleans, Memphis, and St. Louis], *there would be created a system so strong and powerful as to make it impossible for a system with abbreviated lines and serving the same gateways to compete with it.*" (Emphasis supplied.)

After the acquisition of control, the earnings of debtor continued to decline, reaching the lowest point in 1932. In that year and 1933 the Reconstruction Finance Corporation loaned money to debtor for the refinancing of indebtedness, requiring the unrestricted endorsement and guaranty of the Southern Pacific of the collection of both principal and interest on the notes. These loans, amounting to $17,882,250, matured on June 1, 1935, and on May 11, 1935, debtor asked the Commission to approve an extension of the loan. On May 31, 1935, division 4, in *St. Louis S. W. Ry. Co. Reconstruction Loan*, 207 I. C. C. 377, approved an extension for a period not to exceed two years, stating that the "collateral heretofore pledged, together with the unconditional guaranty of the Southern Pacific Company of the collection of principal and interest of the

note or notes evidencing the loans, as extended, constitutes full and adequate security for the loans." The division also found "That the applicant is not in need of financial reorganization in the public interest at this time." As stated in the report of the majority, the Reconstruction Finance Corporation refused to make the loan, unless the Southern Pacific would "guarantee repayment or agree that the collateral held by the Reconstruction Finance Corporation to secure a loan made to the Southern Pacific should also apply to the loan sought by the debtor at that time." The Southern Pacific would not agree to either alternative.

In a letter dated November 29, 1935, the Reconstruction Finance Corporation agreed to waive immediate payment of interest, to allow interest to accumulate, and to carry the loan on its books as past due. The Chase National Bank and the Mississippi Valley Trust Company, other creditors with matured loans, on December 3, 1935, agreed to a similar course. However, debtor filed its petition in bankruptcy on December 12, 1935. At the time when it sought extension of the loan in May, 1935, debtor presented to the Commission a forecast of its probable earnings for 1936, indicating a net income after fixed charges of $183,000. Upon filing its petition in bankruptcy in December, 1935, debtor submitted to the court another forecast of earnings for 1936. Between the two forecasts general business conditions had improved. The earnings of debtor had been increasing on the whole steadily and rather rapidly ever since 1932. Nevertheless the second forecast indicated a probable deficit in net income of $1,338,000. The revenue forecast in May was $17,591,000; in December it was $16,350,000. The actual revenue in 1936 proved to be $19,363,508. The actual deficit in net income was only $48,952, and fixed charges would have been earned with a considerable margin over, if it had not been for maintenance expenditures and the fact that the Southern Pacific, when it took over debtor's notes from the Reconstruction Finance Corporation, increased the interest rate from 4 percent to 5 percent.

In May, maintenance expenditures had been forecast as $4,513,000, and in December as $4,671,000. They were actually $5,564,174 under the trustee in bankruptcy. It is of interest to note that in May, 1935, forecasts were presented, not only for 1936, but for 1937, 1938, and 1939

as well. For the three latter years, the maintenance forecasts were, respectively, $4,679,000, $4,815,000, and $4,956,000.

The explanation given in the report of the majority for the differences in the May and December forecasts is not convincing. They were made for radically different purposes and each was, in my opinion, adjusted to its particular purpose. Nor am I persuaded by the evidence that bankruptcy was unavoidable at the time that debtor went into bankruptcy. In the light of the earnings in years subsequent to 1936, until very recently, however, it seems that bankruptcy would have come sooner or later, unless the Southern Pacific had been willing to take steps which I shall discuss hereinafter.

From this history it is not difficult to understand Meyer's frame of mind. He had invested heavily in debtor's common stock at a time when its financial prospects seemed excellent, and for six years thereafter these expectations were sustained by the earnings of the property. Then control fell into the hands of interests that Meyer distrusted, in connection with a scheme to bring three competing railroads under common control in disregard of the law through stock-buying operations. Coincident with the change in control, the earnings of the property began to fall during a period when general business prosperity continued to reign. Meyer fought against this control in every available tribunal, and also endeavored to ascertain the reason for the decline in earnings, for he strongly suspected that those who had obtained effective control through a dominating stock interest were planning to acquire the remaining stock, or ownership of the entire property, at low cost. At times, although a director with a most unusual personal investment (for a railroad director), he was denied information which he sought.

Ultimately the Commission disapproved the unification of the three railroads and took steps to compel divestment of the practical control which had been effected. When the Southern Pacific sought to acquire control, Meyer's optimism began to revive. He had always favored a union with the Southern Pacific and did what he could to bring it about. He was dismayed, however, when the Commission, upon approval of the acquisition of control, failed to follow its accustomed course of requiring that the holders

of the minority stock be given an opportunity to sell at the same price per share that had been paid for the majority, or anything like that price. He was further dismayed by the failure of the debtor to show such gains in traffic and revenue as he had expected would accrue when once it had become a part of the Southern Pacific System. Finally he was more than dismayed when the debtor, after making a more rapid recovery than any other southwestern road from the low earnings of 1932, went into bankruptcy at the end of 1935, only a few months after division 4 had found that it was not in need of financial reorganization and when debtor's own forecasts had indicated that in 1936 it would earn its fixed charges, which in fact it could have done.

Brooding over this succession of events, I think that Meyer has conjured up conspiracies which go beyond the reasonable probabilities of the situation. Nor do I think that he has proved the diversions of traffic which he believed were made, and I doubt whether, even if they existed, which I do not assert, they are capable of proof. The evidence on this matter, pro and con, is very confusing to me, perhaps because I have not been able to study it with the greatest of care. Traffic is so affected by a multiplicity of conditions, including droughts, floods, and pestilences, the development or exhaustion of oil fields and the like, changes in the centers and flow of commerce, rate changes, the operating and soliciting abilities of managements, and many other factors, that it is very difficult to arrive at positive conclusions that there have been deliberate efforts to retard or failure to promote the movement of traffic over particular routes. It is for this reason that I do not now favor the continuation by the Commission with its own resources of the inquiry into these matters which Meyer has endeavored to carry on, although I regret that such an investigation was not instituted when he first asked for it.

However, it has been shown, in my judgment, that debtor has not received all the benefits which would have accrued from full-fledged membership in the Southern Pacific system. While acquisition of control of debtor by the Southern Pacific was approved and authorized by the Commission, a chapter in the Southern Pacific brief herein is headed "With a 13% Minority Stock Interest outstanding, St. Louis Southwestern has been Independently Oper-

ated without Interference or Domination by Southern Pacific."[2] Under this heading, it is stated, among other things, that "Officers and directors of the Southern Pacific, who have functioned as officers and directors of the St. Louis Southwestern, have functioned in the performance of their duties as St. Louis Southwestern officials and not as Southern Pacific officials."

On May 2, 1932, Turney, then head of debtor's traffic department, found it necessary to write to Saunders, occupying a similar position with the Southern Pacific, a letter containing the following statement:

> Now that the Cotton Belt is officially, to quote the Interstate Commerce Commission as well as the Chairman of your Board, "a part of the Southern Pacific system," I am in a position to urge a little more persistently, if that is possible, consummation of three things which are of paramount importance in the system.

"First and foremost" he puts the "question of solicitation of all westbound traffic north of the Ohio river and east of the Mississippi river for our long haul through St. Louis or Memphis."

On August 16, 1932, Upthegrove, debtor's president, addressed a letter to McDonald, president of the Southern Pacific, enclosing a copy of a letter which Turney had written Upthegrove stating that "the Southern Pacific, the Texas & New Orleans and the Cotton Belt must be treated as one integral System" and that traffic must be solicited and routed "via the route or routes which produce the largest net earnings to the System." He presented in great detail facts and figures to show that, excluding traffic affected by the Central Pacific agreement, the System was being short-hauled to an extent which deprived it in 1931 of revenue amounting to as much as $17,000,000, and that if the System had obtained this additional revenue, the debtor's share would have been $14,035,087. This led to conferences which resulted in November, 1932, in the so-called "Turney-Saunders Agreement."

Under this agreement, debtor undertook without limitation to "actively and preferentially solicit all competitive traffic which can move via the Southern Pacific Lines via routes in connection with those lines." The Southern Pacific made a corresponding agreement, but with limita-

tions. One of these was the "contract with the Union Pacific made in connection with the Central Pacific lease", and another was the "traffic agreement with the Rock Island obligating the Southern Pacific to solicit traffic between points in Mexico, Arizona, and southern California upon the one hand, and Middle Western territory upon the other, without discrimination against the Rock Island in favor of any other route." The third, however, which was stated first in the agreement, was

> The maintenance of a fair interchange with other connections as determined by Southern Pacific Traffic Officers.

In testimony before the court in December, 1935, upon the issues raised by Meyer's answer to the petition for reorganization, Upthegrove stated that in 1927 the Southern Pacific solicited without discrimination in favor of the debtor, while the latter solicited preferentially via the Southern Pacific. The examination continued:

> Q. Now, when was that solicitation practice, if it was ever changed, when was it changed?
>
> A. It has not been changed, except as I stated a little while ago, under our present contract the Southern Pacific has agreed to solicit for—consider the Cotton Belt a part of the Southern Pacific system in the solicitation of the long haul and the best revenue for the system.
>
> Q. Does it solicit preferentially now?
>
> A. *It does not. It solicits without discrimination.* (Emphasis supplied.)

Later this colloquy occurred:

> Q. Now, Judge, if you did not know that the agreement between the St. Louis Southwestern and the Southern Pacific [the Turney-Saunders Agreement] was that both roads were to solicit preferentially, it leads me to ask you the question, what happened after that agreement—did the Southern Pacific live up to that agreement?
>
> A. Absolutely, as far as I know.
>
> Q. Well, then how did you get the idea that it was not preferential solicitation?
>
> A. Well, I have never seen any actual difference between preferential and "without discrimination", with a friendly connection.

Clearly the limitation in the Turney-Saunders Agreement stipulating the "maintenance of a fair interchange with other connections as determined by Southern Pacific Traffic Officers" left much to the interpretation and discretion of those officers. Clearly, also, debtor's president, three years after the agreement was made, looked upon it merely as an agreement with a "friendly connection", resulting in no more than solicitation "without discrimination" on the part of the Southern Pacific. Moreover, while the $17,000,000 loss from short-hauling of the system and the consequent $14,035,087 loss to debtor indicated in the Turney memorandum of 1932 were, no doubt, to some extent oratorical figures for the purpose of emphasizing a point which was valid but of somewhat lesser dimensions, and while no doubt it is true, as debtor states on brief, that the transference of this short-hauled traffic to the system was not an "overnight job", nevertheless the benefits actually realized by debtor under the agreement seem to have been of very modest proportions and not at all in harmony with the antecedent fears of the competing railroads. I agree, also, with Meyer that insofar as those benefits took the form of increased fruit and vegetable traffic from the Pacific Coast territory via the Corsicana route, it may well be doubted whether they resulted in increased net earnings to debtor.

This brings me to another very important matter. The uncontradicted evidence is that if the Southern Pacific were to lease the debtor or if the two were to be consolidated, there would be very important savings in expense as well as increases in revenue. In April, 1938, Holden testified in Ex Parte No. 123 that a study of economies possible in a consolidation of the Southern Pacific and the debtor indicated more than three-quarters of a million dollars. Meyer testified that in 1932 (when traffic was at its lowest ebb) Turney told him that savings of $1,009,000 could be realized through consolidation. He further testified that in a conference with Upthegrove in November, 1932, the latter estimated the savings at about $925,000 for the year 1933, on the basis of the earnings of 9 months of the year 1932. In February, 1935, Paul Shoup, vice-chairman of the Southern Pacific, wrote Bovenizer of Kuhn, Loeb & Company, enclosing a tentative plan for reorganization of debtor. This plan proposed a lease of debtor to the Southern Pacific, stating that the savings

"will be not less than $500,000, and may be considerably greater." It also stated that there should be an increase in the earnings of the consolidated property through the entrance of the Southern Pacific Company directly into such important Mississippi gateways as St. Louis and Memphis. Note, in this connection. Shoup's recognition of the fact that the traffic results of the acquisition of control were not such as would follow the actual union of the properties into a single system.

The comments in the report of the majority of these matters are of very considerable interest. For convenience in consideration I quote them here:

> As to the possibilities of a lease of the debtor by the Southern Pacific, as an alternative to reorganization, it appears that such an arrangement, or a consolidation of the properties, holds promise of large savings in operating expenses, with the further promise of some increase in traffic. The Southern Pacific apparently is of the view that the saving in expense and increase in traffic would not be sufficient in amount to justify it in assuming the obligation of the debtor's fixed charges at their present level. It cannot be said in the light of the record that this view of the Southern Pacific is unreasonable. A possible lease cannot under the present law be forced on the Southern Pacific. Such a unification of operation is a step that may follow reorganization of the debtor, rather than a means by which a reorganization otherwise clearly necessary might be avoided. In any event, it could not be accomplished without giving the States involved and the general public opportunity to be heard on the reasonableness of the terms and the underlying question of public interest.

The statement that a lease or consolidation "holds promise of large savings in operating expenses" and "of some increase in traffic" is, as shown above, fully supported by the record. Of most interest, however, is the reason which is given for the unwillingness of the Southern Pacific to consider such a unification, namely, that it would not be justified in "assuming the obligation of the debtor's fixed charges at their present level." Presumably, since the evidence shows that the possibility of a lease or a consolidation had been in mind ever since the acquisition of control, it is this same reason which has deterred

the Southern Pacific all along from proposing a unification. In this connection it must be borne in mind that the Southern Pacific has a cash investment of considerably more than $19,000,000 in the stock of debtor, to say nothing of the stock of its own which it has exchanged for other shares, and it owns debtor's notes for $17,882,250, on which unpaid interest of more than $5,000,000 has accrued. In view of the fact that it could hardly expect the fixed charges of debtor to be materially reduced without bankruptcy and a reorganization which would endanger its investment in debtor's stock and notes (under the approved plan the stock interest will be entirely wiped out), why has the Southern Pacific for nine years deferred possible savings of as much as $1,000,000 per year in anticipation of such an event?

A partial answer to this question may be found in the fact that under the approved plan of reorganization the Southern Pacific will own 38.3 percent of the new preferred stock and 55.4 percent of the new common stock, or 46.9 percent of the total stock. There can be little doubt that these percentages of ownership will give it effective control of the reorganized company. So far as earnings are concerned, the present fixed charges are $3,159,045, included in which is $894,112.50 on the notes of debtor which the Southern Pacific holds. The latter cannot receive any more income until the earnings cover the fixed charges of $3,159,045 (without taking into account accrued and unpaid interest which it is estimated will amount on January 1, 1942, to about $14,000,000). Dividends on the preferred stock would amount to $994,650, of which $965,670 would go to the Southern Pacific. Nothing could come to it on common stock unless the net earnings amounted to more than $4,153,695 (again without taking into account accrued and unpaid interest), in which event it would be entitled, as the holder of $13,083,400 par value of common stock, to 76.1 percent of the excess. In contrast, under the approved plan the fixed charges plus sinking fund payments will be $1,693,495, included within which will be $172,541.40 on consolidated mortgage bonds held by the Southern Pacific, and it will also receive $18,960 in interest on the Southern Illinois & Missouri Bridge Company bonds which will go to it under the plan. Dividends on preferred stock will amount to $937,501, of which $359,381.60 would go to Southern Pacific. If net earnings, however, are more than

$2,630,996, the latter may receive 55.4 percent of the excess. It will be seen that its percentage of the common stock equity, while less than its present percentage, will be much more valuable.[1] It will also be noted that if the Southern Pacific should become the owner or lessee of debtor's property, its equity might become still more valuable, dependent upon the terms of the consolidation or lease. It is evident that the real loss to the Southern Pacific, under the approved plan, will by no means be equal to its apparent loss, and that it will have a possibility of recovery of which the minority stockholders, including Meyer, will be wholly deprived.

There are certain other facts which are significant and important. The annual report of debtor to the Commission for 1940 showed that the system earnings failed to cover fixed charges by $248,758. However, its monthly report of income and balance-sheet items for April, 1941, showed that for the first four months of this year its income after fixed charges was $1,209,383 as compared with a deficit of $156,052 in the corresponding period last year. If this rate of improvement is maintained throughout the year, as it no doubt will be (it probably will increase), the net income after fixed charges for the year will be an astonishing figure. While I agree that such earnings, produced by the extraordinary conditions created by the national defense program, cannot be regarded as a sound criterion for the future, nevertheless they may well give pause for reflection before a reorganization plan is approved which wipes out all of the existing stock and part of the existing indebtedness. Furthermore, they show that a delay in reorganization now will not involve the constant accumulation of claims for accruing and unearned interest which has been so serious a consequence of delay in the past.

In these circumstances, with the earnings as they are and with what appears to be the certain prospect of further large and permanent increases in earnings if a lease or a consolidation could be consummated, I am not at all content that a reorganization plan should now be approved which will have the results for security holders that the plan which the majority approve will have. This is the

1. Of course I recognize that the new stock holdings will not be a substitute for the old, but a partial substitute for debtor's present indebtedness to the Southern Pacific.

best possible time for unification of railroad properties, for with the demand for railroad labor and all labor which now exists, such unifications can be accomplished without the distress to employees which was so disheartening an accompaniment of consolidation and coordination plans during the period of the depression. I realize that the Southern Pacific cannot be forced to agree to a unification with debtor in the form of a lease or a consolidation, but at least it can be given the opportunity to consider a plan of reorganization which will be linked with such a unification, and in my judgment we have ample authority under section 77 of the Bankruptcy Act to see to it that such a plan is considered and, if the record so made warrants, finally to approve it. I would for that purpose reopen the proceeding for further hearing.

While I voted against approval of acquisition of control of debtor by the Southern Pacific, that control is now, and for ten years has been, an accomplished fact, and there is no reason why the union of the two properties should not take the best possible form. Inasmuch as this will be in the interest of both debtor and the Southern Pacific, I can conceive of no good reason why the latter should object. I am also of the opinion that in view of the large increase in net earnings in which a lease or consolidation would result, a reorganization plan in conjunction with such a unification could be devised which would be more favorable to the security holders, including the minority stockholders, than that which is here approved.

The foregoing Proof of Claim, Objections to Allowance of Claim, New Matter in Support of Objections to Claim, Additional Matter in Support of Objections to Claim, and Reply to Objections of Trustees, were all filed in the office of the Clerk of the District Court on the 2nd day of February, 1942.

And on the same day, to wit, the 2nd day of February, A. D. 1942 came Jacob I. Grossman, Special Master, and filed in the Clerk's office of said Court his certain Master's Report etc. in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

MASTER'S REPORT ON RIGHT OF WALTER E. MEYER TO CONTINUE PROSECUTION OF CLAIM NO. 88.

This claim of Walter E. Meyer states that he files it "on behalf of St. Louis Southwestern Railway Company, and as a stockholder of said Company in behalf of himself and other stockholders." The claim charges a conspiracy against the St. Louis Southwestern participated in by the debtor, The Chicago, Rock Island and Pacific Railway Company, and others, and demands an accounting and damages for $31,593,874, which it alleges became due on June 7, 1933. The claim avers that Meyer did not make demand upon the Board of Directors of St. Louis Southwestern to cause that company to file the proof of claim "because, by reason of the fact that Southern Pacific Company and the directors of St. Louis Southwestern Railway Company are liable as co-conspirators, with The Chicago, Rock Island and Pacific Railway Company, such demand would be entirely useless and futile." No summons was ever issued to bring the St. Louis Southwestern or its trustee in bankruptcy, subsequently appointed as hereinafter recited, into this court.

The trustees of the debtor herein filed objections denying the claim. Thereafter a petition for reorganization of the St. Louis Southwestern under Section 77 of the Bankruptcy Act was filed in the United States District Court for the Eastern District of Missouri. That court approved the petition and appointed a trustee. The trustees of the debtor filed supplemental objections urging that Meyer had no standing to continue prosecution of the claim herein in view of the appointment of the trustee for St. Louis Southwestern. I have been requested to submit a report on that question before going into a hearing on the merits of the claim. This report accordingly deals with that question.

My attention was called to two other proceedings instituted by Meyer based upon the same general state of

facts presented by the claim herein, the disposition of which other cases it was thought would materially simplify and decrease the cost of the proceedings in this court. Meyer filed a proceeding in the Southern District of New York, which dismissed his complaint (11 F. Supp. 937, affirmed 84 F. (2d) 411, *petition for certiorari denied* 291 U. S. 607). He later filed a petition before the Interstate Commerce Commission in the reorganization proceedings involving the St. Louis Southwestern (Finance Docket 11040) based upon the same charges. Before the Interstate Commerce Commission more than five thousand pages of testimony were taken on his contentions.

In the first of the two cases above mentioned, the United States District Court for the Southern District of New York entered an order of dismissal on the ground of lack of jurisdiction. The court in its opinion set forth that Meyer was asking for a receiver for the purpose of instituting and asserting the causes of action. Counsel for the trustees of the debtor herein refer to this as a recognition by Meyer that the claim herein, if prosecuted at all, should be prosecuted by a receiver and not by an individual. The same counsel also quote from the Court of Appeals opinion (84 F. (2d) 411) as follows:

"Nor does the bill merit any more success in its demand for a receiver to maintain statutory suits for damages. A trustee has been appointed for the St. Louis Southwestern under Sec. 77 of the Bankruptcy Act in the United States District Court for the Eastern District of Missouri, vesting title to all the property of the railroad company in such trustee under the direction of that court. By an order of the court, pursuant to Sec. 77 (c) (9), the trustee is authorized to investigate and directed to report to the court, any facts pertaining to irregularities, fraud, misconduct, or mismanagement, by which the debtor may have a cause of action, and thus, the necessity, if any, for appointing a receiver in this suit, for the same purpose, has been eliminated. It is not necessary to pass on the propriety of the appointment of a receiver to bring suit in other circumstances."

In the second of the proceedings instituted by Meyer, above mentioned, the Interstate Commerce Commission on July 15, 1941, released its order of June 30, 1941, concerning both the plan of reorganization of St. Louis Southwestern and Meyer's claim against the Rock Island.

The Commission found that there was not sufficient evidence of a claim against Rock Island and the other alleged conspirators to justify an investigation, and further found that the stockholders of St. Louis Southwestern, of whom Meyer was one, no longer had an equity and were not entitled to participate in the plan. In addition, the Commission stated that Meyer could not prosecute any claim which St. Louis Southwestern might have, but that the trustee in bankruptcy of that corporation might do so. The following is copied from the Commission's report:

"• • • While the reorganization proceedings exclude Meyer from bringing a derivative or representative suit in a court or courts of appropriate jurisdiction, if there is a cause of action, it is implicit in such reorganization proceedings that the trustee may bring suit. The trustee has been authorized by the Bankruptcy Court to investigate and directed to report to the court any facts pertaining to irregularities, fraud, misconduct, or mismanagement as the result of which the debtor may have a cause of action; and he has investigated and from time to time reported to the court on such matters."

In my opinion Meyer should not be allowed to prosecute this claim:

(1) The prosecution of claims on behalf of St. Louis Southwestern Railway Company or its trustee is in the exclusive jurisdiction and authority of the United States District Court for the Eastern District of Missouri, in which there is pending the St. Louis Southwestern reorganization case under Section 77 of the Bankruptcy Act. That court has not authorized Meyer to prosecute the claim, nor has that court or its trustee adopted the claim.

(2) The reason for the prosecution by a stockholder of a claim belonging to a corporation ceases when a trustee for the corporation is appointed in reorganization proceedings under Section 77 of the Bankruptcy Act.

(3) Neither the corporation nor its trustee in the reorganization proceedings has been brought into the jurisdiction of this court by summons.

(1)

Subsection (a) of Section 77 (11 USCA, Sec. 205 (a), p. 84) contains the following provision as to the jurisdiction of a court in a proceeding under Section 77 of the Bankruptcy Act:

"If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

This section gives the court in addition to the powers specifically set forth in Section 77, all the powers that a court would have under an equity receivership, and raises the question of whether a corporate claim could be prosecuted by a stockholder without court sanction if a receiver had been appointed for the corporation.

The answer of the cases is apparently clear that where a corporation is being administered by a court under a receivership, the prosecution of a claim belonging to the corporation may neither be commenced nor continued without express authorization from the court. A leading case on that point is *Klein* v. *Peter*, 284 F. 797 (CCA 8, 1922). In that case several stockholders of the Mascot Mining & Milling Company first requested the court to direct its receiver to file suit against directors of the corporation, and, when their application was refused, filed suit themselves. Their right to bring the suit in view of the receivership was questioned. The court held they had no such right. The following portion of the opinion is significant:

"Concededly, were it not for the fact that the Mascot Mining & Milling Company, Limited, of Idaho, appellee, is in the hands of a receiver, this action could be prosecuted by appellants. What effect does the receivership have as to their authority to bring the action? It is the general rule that, where a corporation is in the hands of a receiver, a stockholder cannot sue without the sanction of the court appointing the receiver. And it is further the general

rule that such stockholder cannot sue, even where the court has granted him permission to do so, where there is no order purporting to assign to him or to confer on him the right to enforce the claim vested in the receiver. The property of the corporation, which would include claims of action on behalf of the corporation is in the possession and custody of the court, held by the receiver as an officer of the court. In a suit by a stockholder in behalf of the corporation the real controversy is between the corporation and the person whose acts are complained of, and the suit is for the benefit, not of the individual, but of all the stockholders. Where the corporation is in the hands of a receiver, the right of action by the receiver to protect the interest of the corporation is exclusive. We believe such is practically the unanimous voice of the authorities."

The identical facts were involved in the case of *Klein* v. *Peter*, 286 F. 362, decided by the Circuit Court of Appeals for the Ninth Circuit, and the court denied the right of the stockholder to proceed.

In *Porter* v. *Sabin*, 149 U. S. 473 (1892), a receiver was appointed for a corporation in a state court proceeding. Certain stockholders filed a petition praying that the receiver be directed to bring suit against certain of the directors of the corporation for malfeasance. The court denied the application. The stockholders then asked for leave to bring the suit themselves, making the receiver a party. This too was denied. They nevertheless sued. The Supreme Court held that the stockholders had no right to prosecute the claim, and said:

"The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it."

Also see *Vogt* v. *Rush D. Hiller Co.*, 44 Ohio App. 244, 184 N. E. 34, and *Kelly* v. *Dolan*, 233 F. 635 (CCA 3, 1916).

It is obvious that continuance without court permission of a prosecution previously begun is equally inconsistent with those powers of exclusive management. If the court must pass upon the desirability of filing a corporate claim, it is of equal importance that it pass upon the desirability of proceeding with the suit. This was held by the court in *Adler* v. *Seaman*, 266 F. 828 (C. C. A. 8, 1920). In that

case, Seaman, a preferred stockholder of United Railways Company, filed a stockholder's suit charging waste and maladministration by certain present and past directors of the company, and praying for an accounting, the appointment of a receiver, and other relief. Three months later, Adler, a bondholder, filed a suit praying for the appointment of a receiver and the receiver was appointed. The court made the following statement about the continued prosecution of the prior stockholder's suit:

"It is thus clear that the receiver in the Adler bill would have been a necessary party to any action such as Seaman brought, had Seaman commenced his action after appointment of the receiver in the Adler suit. The circumstance that such suit was pending when the Adler receiver was appointed cannot alter or affect this rule. The receiver is not a party to that suit. He can become such only by an order of the court (*Wilder* v. *City*, 87 Fed. 843, 31 C. C. A. 249 (C. C. A. 5th Circuit); 22 Standard Enc. of Prac. 434; High on Receivers (4th Ed.) § 258), although he might be made so by such an order (*National Electric Signaling Co.* v. *Telefunken Wireless Teleg. Co.*, 208 Fed. 679, 698, 125 C. C. A. 647)."

The court said in the *Adler* case that the receiver appointed after the commencement of the stockholder's suit was a necessary party to that suit and that he could be made such a party only with the consent of the court appointing him. That, of course, is equivalent to saying that the stockholder, in order to continue with his suit after the corporation went into receivership, must first have received the consent of the court having jurisdiction of the receivership. That holding was reaffirmed by the same court in *Seaman* v. *McCulloch*, 8 F. (2d) 820 (C. C. A. 8, 1926), where the court pointed out that its ruling in *Adler* v. *Seaman* was not dictum.

The question of the continuance without court consent of the prosecution of a suit previously commenced was also involved in *Kokomo City St. Ry. Co.* v. *Pittsburgh, C. C. & St. L. Ry. Co.*, 58 N. E. 211 (App. Ct. of Indiana, 1900). The court held as follows:

"In 5 Thomp. Corp. § 6900, it is said: 'The necessary effect of the appointment of a receiver, unless the statute under which he is appointed, or the order appointing him, is restrictive, is to suspend all right of action, of whatever description, on the part of the corporation, since the

receiver of a general receivership, whether it be what is called a receivership pendente lite, or a receivership for the purpose of winding up the corporation, is vested with the right to the custody of all the assets of the corporation, of whatever description, for the purposes of the administration; and this necessarily includes every right of action, of whatever description, which is possessed by the corporation.' The action of the court in appointing a receiver for appellant corporation suspended appellant's right to further prosecute the claim against appellee. Under the order of the court, as the servant of the court and the representative of the corporation and of the creditors, the receiver could continue the action, or dismiss or compromise it. Whatever claim appellant corporation had against appellee became an asset in the hands of the receiver, to be administered by him under the directions of the court appointing him."

The exclusive administration and control by a court of the properties of a corporation in receivership does not therefore permit of the commencement or continuance of the prosecution of a corporate claim without court permission. There may be various reasons for the courts concluding that the claim should not be prosecuted. It may be convinced that the claim is not meritorious and that prosecution of it would only delay the completion of a reorganization. Moreover, equity receivership contemplates the continued operation of a corporation, and prosecution of a suit may be inimical to those operations.

The applicability of these considerations to a corporation which is being administered under the provisions of Section 77 cannot be doubted. Subsection (a) of Section 77 (quoted above) expressly confers on the court all the powers it would have under an equity receivership. Moreover, the function of the court in a reorganization proceeding under Section 77 is almost identical with its function under an equity receivership. Even without express statutory provision, there would be every reason for urging that its powers are at least as great as in a receivership.

(2)

Not only is the continued prosecution of the claim repugnant to the powers of the court having jurisdiction of St. Louis Southwestern, but it should not be permitted

because there no longer is any reason for prosecution of the claim by a stockholder. The only reason for ever permitting a stockholder to assert a corporate cause of action is the unjustified refusal by the directors themselves to do so.

Where, however, the control of the corporation has passed from the directors to the court under a Section 77 proceeding, it cannot be assumed that the court will refuse to permit the assertion of any right worthy of assertion. This is well pointed out in *Swope* v. *Villard*, 61 F. 417 (C. C. S. D. N. Y., 1894), where the court stated as follows:

"The management of the affairs of the company was taken by the court; by the receivers only as its officers. Receivers can act only under the orders of the court. A request for action by the receivers is not complete until it reaches the court itself, to which the receivers are responsible. Neglect of such a request, or even a refusal of such a request by the receivers alone, certainly cannot justify a stockholder in usurping the receivers' functions, by prosecuting in another court a cause of action which the receivers should have prosecuted. It is the fundamental doctrine, in regard to such stockholders' suits as this, that the stockholder must have exhausted reasonable effort to cause action to be taken by the proper managers of the company's affairs. Such reasonable effort is not exhausted, when the management is in a court, until such court has been asked to act, or to direct action by its receivers. It may well be doubted whether the refusal of such an application by the court would give a stockholder the right to sue. *Neglect and dereliction of duty can hardly be charged against a court; especially, in one federal court against another. The refusal of the court to direct suit upon an alleged cause of action would seem rather to prevent a stockholder from suing thereon, than to give occasion for his doing so, unless the court expressly authorized him to sue.*"

Similar language was used by the court in the case of *Kelly* v. *Dolan*, 218 F. 966 (D. C. E. D. Pa., 1914):

"A corporation is injured by the acts of others. Where the affairs of the corporation are under the care of a management to which they have been committed by the stockholders, and those managers are in the bona fide exercise of the powers committed to them, every principle

of the regular and orderly administration of the law and of the logical development of legal procedure, and every principle of sound, legal policy, as well as a due regard to the rights of the defendants, forbid that any stockholder, or any one, other than the corporation itself, may institute an action to redress its wrongs. Where, however, the wrong done to the corporation is followed by a second wrong to the stockholders, wrought by means of a mala fide refusal to redress the first wrong, there the stockholders may themselves seek redress. The right of the stockholder, however, is based, not upon the first wrong, but the second. *When, again, the power to redress the first wrong has passed from the hands of the corporation into the hands of a court, the possibility even of such second wrong cannot be supposed. The right of the stockholders which rests upon it has therefore lost its entire support.*"

These cases receive special significance when considered in the light of Section 77 (c) (9), which specifically imposes the duty on the court of directing the trustee appointed by it to investigate claims which the corporation may have as a consequence of irregularities, fraud, or mismanagement. It was in reliance on the provision just referred to that the Commerce Commission made the statement hereinbefore quoted, to the effect that after the appointment of the trustee, the trustee was the one to bring suit.

The justification for decisions of this nature is apparent. A suit by a stockholder is an anomaly, since management of a corporation does not vest in its stockholders and certainly not in individual stockholders. It is made necessary where the management of the corporation is because of self-interest unable to reach an impartial decision as to whether a suit should be prosecuted. The disadvantages of a stockholder's controlling a corporate suit are suffered in that instance because there is apparently no alternative. Where a trustee or receiver, who serves subject to the direction of a court is appointed, the reason for prosecution by a stockholder ceases to exist.

The authorities above cited, particularly those bearing on the exclusive jurisdiction of the court and the lack of necessity of prosecution of a claim by a stockholder after the appointment of a receiver, lead to the conclusion that Meyer should not be permitted to continue the prosecution

of the claim of St. Louis Southwestern. The authorities cited by Mr. Meyer are not in my opinion controlling: (1) Only one of them (*Meyer* v. *Page*, 112 App. Div. (N. Y.) 625) was a stockholder's suit, and it is not in point because the trustee was made a party; (2) All of them involved liquidating bankruptcies as distinguished from reorganization. If there is a distinction between the powers of a court in an equity receivership and its powers in a liquidating bankruptcy proceeding with respect to the prosecution of a corporate cause of action, it is my opinion that the receivership cases should apply in this reorganization case, in accordance with the provisions of Section 77 hereinabove referred to.

(3)

What I have hereinbefore said has been on the assumption that the claim was properly filed in the first instance. However, it seems that this was not the case. The corporation is an indispensable party to a suit brought on its behalf by a stockholder. A failure to make it a party leaves the stockholder without a cause of action and the court without jurisdiction (14 C. J. (Corporations) Sec. 1461; *Bruschke* v. *Der Nord Chicago Schuetzen Verein*, 145 Ill. 433, 446).

It was incumbent upon Meyer, suing as a stockholder, to bring the St. Louis Southwestern Railway Company and its trustee in bankruptcy into this court by summons (see *Bruschke* case, *supra*, p. 446, last par.).

Before a stockholder can be allowed to sue on behalf of the corporation, he must allege facts showing that the directors have violated their fiduciary duties and that he has either demanded that they bring the suit and they have refused, or that they have violated their duty to such an extent that demand upon them would be futile. An allegation of fact is thus made upon which the corporation and its directors can take issue. They are not informed of the allegations and are not called upon to answer until they are brought into court by summons. Meyer has not brought the corporation or its directors or the trustee in bankruptcy into this court either in the present bankruptcy proceeding or in a separate proceeding. And as hereinbefore pointed out, Meyer cannot make

the trustee appointed by the Missouri District Court a party defendant without that court's consent.

For the reasons hereinabove mentioned, I find and conclude that Meyer should not be permitted to maintain this claim.

Dated at Chicago, Illinois, this 27th day of November, 1941.

Respectfully submitted,

Jacob I. Grossman,

Special Master.

And on the same day on, to wit, the 2nd day of February, A. D. 1942, came Jacob I. Grossman, Special Master, and filed in the Clerk's office of said Court his certain Master's Supplemental Report, etc. in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

MASTER'S SUPPLEMENTAL REPORT ON RIGHT OF WALTER E. MEYER TO CONTINUE PROSECUTION OF CLAIM NO. 88.

After submitting a draft of my proposed report to the parties, claimant Walter E. Meyer filed Suggestions as to modification of that report. Meyer also filed a "Reply" to objections heretofore filed by the trustees; this "Reply", he states in a letter of December 27, 1941, merely presents formally what he has already presented herein in the form of letters, and I therefore see no reason to exclude it. As to the Suggestions filed by Meyer, after carefully considering them I have concluded to adhere to the proposed report. However, for the convenience of the court and of the parties I am commenting on those Suggestions:

Points 1, 3, 5, 6, 7: In these points Meyer asks for recitals of the respective filing dates of the claim herein, the bankruptcy petition of the St. Louis Southwestern Railway Company and the objections to the trustees to this claim, for a statement of the substance of certain additional objections later filed by the trustees, and for a restatement of the question with which the report deals.

I think the report is clear and sufficiently presents the facts without the changes. Whether or not the report is changed to make these recitals, they are part of the record and available for claimant's use in argument if he deems them relevant.

Points 2 and 4: Meyer asks that the sentence "No summons was ever issued to bring the St. Louis Southwestern or its trustee in bankruptcy into this court" be moved to another position. The change of position would be of no significance. However, I have inserted after "bankruptcy" the words "subsequently appointed as hereinafter recited." (Report, p. 1.)

Point 8: Meyer asks the omission of mention of certain prior proceedings (Report, p. 2, line 13, to p. 4, line 23). The report sets forth the substance of previous proceedings and the interpretation of them by counsel for the trustees. The request for omission is directed to the force and effect herein of the decisions in those prior proceedings. The report does not discuss the effect of the prior proceedings; it merely mentions them for information as part of the statement of facts. I can see no reason to omit the statement.

Point 9 is merely a disagreement with the entire report. I have concluded to adhere to the conclusions as stated.

Point 10: Meyer requests that the report be altered to permit him to petition the St. Louis Southwestern Railway Company reorganization court for authority to join the trustee, and that the report be altered to permit Meyer to amend his claim to set forth such authorization and joinder. For two reasons this request should in my opinion be denied: First, because this is not a claim that may be remedied by amendment; and second, because even if a new claim could be filed, the discretion of this court should not in this instance be exercised to permit such filing, by way of amendment or otherwise.

As to the first point: This is a claim by Meyer, a stockholder, on behalf of a corporation. The corporation, an indispensable party, was not summoned, and cannot now be brought into this court because a trustee has now been appointed under the bankruptcy act. The trustee cannot be brought into this court in substitution for the corporation, since there is no authority for stockholders' suits in behalf of court trustees, and certainly not when the trustee is not guilty of any misconduct in his refusal

or failure to sue. In other words, there is no stockholders' suit now in existence, since an indispensable party was not served (see *U. S.* v. *American Lumber Co.*, 80 F. 309, *Armbruster* v. *City of Wildwood*, 41 F. (2d) 823, 826, holding that suits are not "brought" or "commenced" until appropriate process is sued out and an attempt made to serve such process), and no stockholders' suit can now be commenced, since the corporation, the indispensable party, can no longer be served, and since, as against the trustee, no suit by a stockholder will lie.

In any event, it is noted in my report that the only reason for permitting the anomalous stockholders' suit ceases when a trustee is appointed; and that after such appointment a stockholders' suit already begun may not be continued.

As to the second point: Even if a stockholders' suit could now be commenced and prosecuted, this is not an instance in which the discretion of this court should be exercised to permit a new claim to be filed by way of amendment or otherwise, after the expiration of the time for filing claims. (An order was entered on January 23, 1934, requiring that all claims against the debtor be filed by May 1, 1934; and see Finletter, Principles of Corporate Reorganization, p. 257, footnote 33 and cases there cited.) Four reasons may be given:

(1) Meyer, as a stockholder, probably no longer has an interest in any recovery, since the tentative plan of reorganization for the St. Louis Southwestern wipes out stockholders' interests. (Cf. *Stebbins* v. *Michigan Wheelbarrow & Truck Co.*, 191 F. 238, 243; *Darragh* v. *Wetter Mfg. Co.*, 78 F. 7, 15, 16; *Falvey* v. *Foreman State Nat'l. Bank*, 101 F. (2d) 409, 416 (C. C. A. 7, 1939), commented on favorably in 38 Mich. Law Rev. 96.)

(2) Meyer has had an opportunity to and did pursue his remedy before the Interstate Commerce Commission. In a letter to me filed June 7, 1941, Meyer points out (at p. 2):

"There were 4,104 pages of testimony taken and 330 exhibits filed in the hearings in the reopened proceedings in May and September 1939. Voluminous briefs were submitted in 1940 by the writer and by the attorneys for Southern Pacific Company and St. Louis Southwestern, who appeared in opposition to the writer. The matter was

orally argued before the full Commission in October 1940."

The District Court of Missouri has had the duty of investigating any causes of action (see Bankruptcy Act, Sec. 77 (c) (9)), and Meyer has had his opportunity to bring possible claims to the attention of that court.

(3) In view of the decision of the Interstate Commerce Commission mentioned in my report, and in view of the fact that neither the trustee of the St. Louis Southwestern Railway, nor the District Court of Missouri which has jurisdiction of the reorganization of that railway, has deemed it worth while to appear or to order appearance herein, in spite of a duty to investigate and pursue possible causes of action (see Bankruptcy Act, Sec. 77 (c) (9), it is probable that the existence of a cause of action is highly doubtful. In this connection Meyer points to the Interstate Commerce Commission dissenting opinion of Chairman Eastman, and contends that the dissenting opinion indicates that a cause of action does exist. It seems to me that this dissent also indicates that no cause of action exists. I quote from the opinion, at Sheet 292:

"Brooding over this succession of events, I think that Meyer has conjured up conspiracies which go beyond the reasonable probabilities of the situation. Nor do I think that he has proved the diversions of traffic which he believed were made, and I doubt whether, even if they existed, which I do not assert, they are capable of proof."

(4) If this claim is baseless, it would delay this (the Rock Island) reorganization and would needlessly take time and effort of many persons, duplicating much that has been done before the Interstate Commerce Commission.

Dated at Chicago, Illinois, this 27th day of January, 1942.

Respectfully submitted,

Jacob I. Grossman,
Special Master.

And afterwards to wit, the 3rd day of March, A. D. 1942 came Walter E. Meyer and filed in the Clerk's office of said Court his certain objections to report and supplemental report of Special Master in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

OBJECTIONS TO SPECIAL MASTER'S REPORT AND SUPPLEMENTAL REPORT.

The undersigned, claimant in behalf of St. Louis Southwestern Railway Company in the above entitled proceedings, makes the following objections to the Report and Supplemental Report of the Special Master, filed in this Court on February 2, 1942:

(1) Objects to the finding and conclusion of the Special Master that the prosecution of the claim in behalf of St. Louis Southwestern Railway Company or its trustee is in the exclusive jurisdiction and authority of the United States District Court for the Eastern District of Missouri, and that on that account Meyer should not be allowed to prosecute the claim.

(2) Objects to the conclusion of the Special Master that because the United States District Court for the Eastern District of Missouri is given all the powers it would have had if it had appointed a receiver in equity of the property of St. Louis Southwestern, that on that account Meyer should not be allowed to prosecute the claim in behalf of St. Louis Southwestern Railway Company.

(3) Objects to the conclusion of the Special Master that because neither the St. Louis Southwestern Railway Company nor its trustee was brought into the jurisdiction of this Court by summons, there was no filing of the claim and therefore there cannot be any amendment of the claim.

(4) Objects to the finding and conclusion of the Special Master that the claim is without merit and that on that account this Court, if it deems the claim was not properly filed, should not allow Meyer to amend the claim or to file a new claim in behalf of St. Louis Southwestern Railway Company.

(5) Objects to the finding and conclusion of the Special Master that the prosecution and proof of the claim would delay the Chicago, Rock Island & Pacific Railway Company reorganization and that a hearing on the merits of the claim is unnecessary in view of the proceedings before the Interstate Commerce Commission in the St. Louis Southwestern Railway Company Reorganization, Finance Docket No. 11040.

(6) Objects to the finding and conclusion of the Special Master that because of the appointment of a Trustee in the proceedings for reorganization of St. Louis Southwestern Railway Company, the reason for prosecution of the claim by Meyer ceased and that on that account Meyer should not be permitted to prosecute the claim.

(7) Objects to the finding and conclusion of the Special Master that because the plan of reorganization formulated by the Interstate Commerce Commission for St. Louis Southwestern Railway Company wipes out all of Meyer's interest as a stockholder of said company, on that account Meyer should not be allowed to amend the proof of claim and to prosecute said claim.

Walter E. Meyer,
Claimant in behalf of
St. Louis Southwestern
Railway Company.

Dated: New York, March 2, 1942.

And afterwards, to wit, on the 7th day of February, A. D. 1944 being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

ORDER ON CLAIM NO. 88, WALTER E. MEYER.

On April 30, 1934, Walter E. Meyer filed a claim in these proceedings on behalf of himself and other stockholders of the St. Louis Southwestern Railway Company, which claim was numbered 88. It was alleged in the claim that the Debtor herein was indebted to the St. Louis South-

western Railway Company by reason of damages sustained by that road as a result of a conspiracy extending over a protracted period of time, in which the Debtor herein participated and which, it was alleged, resulted in the loss of substantial revenues to the St. Louis Southwestern Railway Company. In addition to damages resulting from this conspiracy, the claimant asked for an accounting from Debtor because of alleged profits in the amount of $2,467,000.00 resulting from the sale of Debtor's dominant interest in the stock of the St. Louis Southwestern Railway Company. The claimant further alleged that these profits resulted from a breach of a fiduciary relationship which existed between Debtor herein and the St. Louis Southwestern Railway Company.

On May 25, 1935, the Trustees of the Debtor herein filed objections denying the allegations of the claim, and objecting to the allowance thereof.

On December 12, 1935, the St. Louis Southwestern Railway Company filed a petition for reorganization under Section 77 of the Bankruptcy Act, and on January 3, 1936, a Trustee was appointed for said Road under the provisions of that Act.

Subsequently, on January 16, 1936, the Trustees of the Debtor herein filed further objections to the claim of claimant, in which it was alleged that by reason of the petition for reorganization filed by the St. Louis Southwestern Railway Company under Section 77 of the Bankruptcy Act, and the appointment of a Trustee thereof, any right of action for the alleged wrongs set forth in the claim filed herein became vested in the Trustee of said Railroad, and that for that reason claimant could not prosecute any derivative suit on behalf of the St. Louis Southwestern Railway Company or its stockholders.

Said claim, together with the objections thereto, was referred to a Special Master for a hearing, and the interested parties requested that the Special Master, before entering upon a hearing on the merits of the claim, dispose of the objections thereto questioning the right of claimant to further prosecute said claim.

On the 8th day of December, 1941, the Special Master reported adversely to claimant, and recommended that the claim be disallowed. After the draft of that Report was submitted to the interested parties, claimant herein filed suggestions as to a modification of the Report and a reply

to objections theretofore filed by the Trustees to the claim. Subsequently, said Special Master filed his Supplemental Report, dated January 27, 1942 and filed in this cause on February 2, 1942, which Supplemental Report likewise recommended the disallowance of the claim of claimant for the reason, among others, that claimant could not prosecute said claim on behalf of the St. Louis Southwestern Railway Company and its stockholders as a derivative suit after the appointment of a Trustee under Section 77 of the Bankruptcy Act, inasmuch as all rights of action upon behalf of the Railway Company under the provisions of Section 77 of the Bankruptcy Act were vested in the appointed Trustee.

This cause came on to be heard before the Court on the 13th day of May, 1942, on the motion of the Trustees of the Debtor herein, to approve the Special Master's Report and Supplemental Report, and on that date said cause was taken under advisement by the Court.

The Court, after examining said Report of the Special Master and the briefs submitted by the respective parties, FINDS that the cause of action sought to be litigated by the claim filed herein is a suit by a stockholder of the St. Louis Southwestern Railway Company, brought on behalf of himself and other stockholders of that railroad, seeking to recover damages for wrongs alleged to have been suffered by the railroad.

THE COURT FURTHER FINDS that on the 12th day of December, 1935, the St. Louis Southwestern Railway Company filed its petition for reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the Eastern District of Missouri. Subsection (a) of Section 77 (11 U.S.C.A. Sec. 205 (a)) provides in part as follows:

"If the petition is so approved, the Court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

On January 3, 1936, a Trustee of the debtor's estate was appointed under the provisions of that Act. The ap-

plicable provision is Sub-section (b) (2) of Section 77 (11 U.S.C.A., Sec. 205 (b) (2)), which provides in part as follows:

"The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor."

Under the foregoing provisions of the Bankruptcy Act, upon approval of a petition for reorganization and the appointment of a trustee or trustees, all rights of action on behalf of the debtor are vested in the trustee or trustees, subject to the control of the Bankruptcy Court. While a debtor's property is being administered upon in a Bankruptcy Court, it would be inconsistent to have rights of action in favor of the debtor enforcible by its stockholders at their own will and discretion. If a trustee should refuse or fail to act, the stockholders may request the Court to issue appropriate instructions to the trustee. The record here does not show that claimant ever requested such action or obtained permission from the District Court for the Eastern District of Missouri to prosecute this claim.

THE COURT THEREFORE FINDS that the claimant herein has no right to prosecute the cause of action set forth in the claim filed herein, and that the Master's Report and Supplemental Report in this cause should be approved.

IT IS THEREFORE ORDERED that said Master's Report filed herein on December 29, 1941, and his Supplemental Report filed herein on February 2, 1942, be and they are hereby approved; and IT IS FURTHER ORDERED that Claim No. 88 filed in this cause by Walter E. Meyer on the 30th day of April, 1934, be and the same is hereby disallowed.

Enter:

M. L. Igoe,
Judge.

Dated, this 7th day of February, A.D. 1944.

And afterwards on, to wit, the 6th day of March, A.D. 1944 came Walter E. Meyer and filed in the Clerk's office of said Court his certain Notice of Appeal in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION.

In the Matter of: THE CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY, *Debtor.*	No. 53209. In Proceedings for the Reorganization of a Railroad.

NOTICE OF APPEAL.

Notice is hereby given that Walter E. Meyer, claimant herein, hereby appeals to the Circuit Court of Appeals of the United States for the Seventh Circuit from the order entered in the above entitled cause by the District Court on February 7, 1944 whereby said court approved the report of the Special Master and the supplemental report of said Special Master, and whereby said court ordered that the claim filed by Walter E. Meyer be disallowed.

Claimant appeals from said order and requests that it be reversed and the cause remanded with instructions to the District Court to proceed to hear and determine the claim of Walter E. Meyer on its merits.

Walter E. Meyer,
Pro Se.

31 Nassau Street
New York City, N.Y.

And afterwards, to wit, the 29th day of April, A.D. 1944 came the Appellant by his attorneys and filed in the Clerk's office of said Court his certain Statement of Points in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—53209) * *

STATEMENT OF POINTS RELIED UPON BY CLAIMANT, ON HIS APPEAL FROM ORDER ENTERED FEBRUARY 7, 1944.

The appellant, Walter E. Meyer, relies upon the following points for reversal of the order herein entered February 7, 1944:

(1) The Court erred in approving the Master's Report filed herein on December 29, 1941, and the Master's Supplemental Report filed herein on February 2, 1942.

(2) The Court erred in disallowing Claim No. 88 filed in the above entitled cause by appellant on April 30, 1934.

(3) The Court erred in holding that the appellant herein has no right to prosecute the cause of action set forth in the claim filed herein.

(4) The Court erred in finding and holding that the approval by the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, of the petition for reorganization of St. Louis Southwestern Railway Company on December 31, 1935, prevents the appellant from continuing to prosecute the claim filed by him in behalf of St. Louis Southwestern Railway Company.

(5) The Court erred in holding that the appointment of a trustee in the proceedings for the reorganization of the St. Louis Southwestern Railway Company prevents appellant from continuing to prosecute the claim in behalf of St. Louis Southwestern Railway Company.

(6) The Court erred in holding that after the institution of reorganization proceedings of St. Louis Southwestern Railway Company and the appointment of a trustee in said proceedings, appellant was unable to prosecute the claim and it became necessary for him to ask the trustee of St. Louis Southwestern Railway Company to prosecute the claim, and upon the trustee's refusal to do so, to request the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, to issue appropriate instructions to the trustee to prosecute the claim.

(7) The Court erred in holding that after the institution of reorganization proceedings and the appointment

of a trustee of St. Louis Southwestern Railway Company, it became necessary for the appellant to obtain permission from the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, to continue to prosecute the claim in this Court.

(8) Appellant had the right to file his claim in this Court without joining St. Louis Southwestern Railway Company as a party defendant.

(9) Upon the appointment of a trustee for St. Louis Southwestern Railway Company, appellant had the right to continue to prosecute his claim in this Court without joining said trustee as party to the proceedings in this Court.

(10) Said order entered February 7, 1944, is otherwise erroneous and contrary to law.

Dated: New York, April 27th, 1944.

Walter E. Meyer,
Appellant Pro Se.

Sonnenschein, Berkson, Lautmann,
Levinson & Morse,
Attorneys for Appellant,
77 West Washington Street
Chicago 2, Illinois.

Northern District of Illinois, } ss:
Eastern Division }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in the Matter of the Claim of Walter E. Meyer and objections thereto, made in accordance with the designation filed in this Court on April 29, 1944, in the cause entitled The Chicago, Rock Island and Pacific Railway Company, Debtor, No. 53209, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this 13th day of May, A.D. 1944.

Roy H. Johnson,
Clerk.

(Seal)

And to wit, on the 11th day of October, 1944, the following further proceedings were had and entered of record, to wit:

October 11, 1944

* * (Caption—8585) * *

Before:

Hon. Otto Kerner, Circuit Judge.

It is ordered that the stipulation of counsel as to reprinting the record, etc., be and it is hereby approved.

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, filed on the fourth day of December, 1944, in:

Cause No. 8585.

In the Matter of: The Chicago, Rock Island and Pacific Railway Company,

Debtor.

Walter E. Meyer,

Claimant-Appellant,

vs.

Joseph B. Fleming and Aaron C[illegible]non, as Trustees of The Chicago, Rock Island and Pacific Railway Company,

Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of July, A. D. 1945.

(Signed) Kenneth J. Carrick,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the twenty-eighth day of September, in the year of our Lord one thousand nine hundred and forty-three, and of our Independence, the one hundred and sixty-eighth.

In the Matter of:
The Chicago, Rock Island and Pacific Railway Company,
Debtor.

Walter E. Meyer,
Claimant-Appellant,
8585 *vs.*
Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit: On the ninth day of May, 1945, the following further proceedings were had and entered of record, to-wit:

Wednesday, May 9, 1945.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

In the Matter of:
The Chicago, Rock Island and Pacific Railway Company,
Debtor.

Walter E. Meyer,
Claimant-Appellant,
8585 *vs.*
Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel and on oral argument by Mr. Walter E. Meyer, pro se, for the appellant and by Mr. W. F. Peter, counsel for appellees, and the Court takes this matter under advisement.

And afterwards, to-wit: On the sixth day of June, 1945, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 8585. OCTOBER TERM, 1944, APRIL SESSION, 1945.

In the Matter of:
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor.

WALTER E. MEYER,
Claimant-Appellant,
vs.
JOSEPH B. FLEMING and AARON COLNON, as Trustees of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

June 6, 1945.

Before EVANS and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This is an appeal from an order disallowing a claim in proceedings for reorganization of The Chicago, Rock Island and Pacific Railway Company.[1]

Claimant-appellant filed a claim on behalf of himself and other stockholders of St. Louis alleging that debtor was indebted to St. Louis by reason of damages sustained for its participation in a conspiracy by which St. Louis was controlled by debtor, also a cause of action arising out of a conspiracy in which Kansas and debtor participated by

1. Hereinafter the parties will be referred to as follows: The Chicago, Rock Island and Pacific Railway Company as "debtor." St. Louis Southwestern Railway Company as "St. Louis." Kansas City Southern Railway Company as "Kansas."

which St. Louis was controlled, and a cause of action for an accounting for profits realized by debtor as a result of the purchase and subsequent sale to Kansas of its dominant stock interest in St. Louis. Both of said last two conspiracies, it is claimed, were in breach of a fiduciary relationship existing between debtor and St. Louis.

On December 12, 1935, St. Louis filed in the United States District Court for the Eastern District of Missouri a petition for reorganization under § 77 of the Bankruptcy Act, 11 U. S. C. A. § 205, and on January 3, 1936, a trustee was appointed for St. Louis. January 16, 1936, the trustees of debtor filed objections to appellant's claim alleging that by reason of the reorganization proceeding and the appointment of a trustee for St. Louis, any right of action for the alleged wrongs set forth in the claim became vested in the trustee of St. Louis and claimant could no longer prosecute the claim.

The claim and the objections were referred to a master. He heard the evidence and filed his report in which he found that a trustee had been appointed by the United States District Court for the Eastern District of Missouri under § 77 of the Bankruptcy Act; that claimant had filed a petition before the Interstate Commerce Commission in the reorganization proceedings involving St. Louis based upon the allegations set forth in the claim filed in the case before us; and that the Commission had found that there was not sufficient evidence of a claim against the debtor to justify an investigation. From these findings the master concluded, *inter alia*, that the prosecution by a stockholder of a claim belonging to a corporation ceases when a trustee for the corporation is appointed in a reorganization proceeding under § 77 of the Bankruptcy Act; that prosecution of claims on behalf of St. Louis or its trustee was in the exclusive jurisdiction and authority of the District Court of Missouri; and that since that court had not authorized claimant to prosecute the claim, nor had the court or trustee of St. Louis adopted the claim, he recommended that the claimant should not be permitted to maintain his claim. The District Court adopted the master's findings of fact, overruled exceptions and objections to the report, and entered the order from which this appeal is prosecuted.

In the order the court stated: "While a debtor's property is being administered upon in a Bankruptcy Court, it would be inconsistent to have rights of action in favor of

the debtor enforcible by its stockholders at their own will and discretion. If a trustee should refuse or fail to act, the stockholders may request the Court to issue appropriate instructions to the trustee. The record here does not show that claimant ever requested such action or obtained permission from the District Court for the Eastern District of Missouri to prosecute this claim."

Claimant-appellant, in arguing for a reversal of the order, insists that since the procedure in interstate railroad reorganization under § 77 is substantially that of an equity receivership, the appointment of the trustee did not prevent the continued prosecution of a claim filed previous to the appointment and cites, among other cases, the cases appearing in the margin.[2] With this contention, under the circumstances here appearing, we cannot agree.

By the provisions of § 77(a) and (c)(2), the court has exclusive jurisdiction of the debtor and its property, wherever located, and has and may exercise in addition to the powers conferred by that section all the powers which a Federal court would have if it had appointed a receiver in equity of the property of a debtor for any purpose, and when a trustee is appointed he shall have all the title and shall exercise all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, 11 U. S. C. A. § 205 (a) and (c) (2).

At this point it may be desirable to discuss some of the cases cited by appellant.

In *Johnson* v. *Collier*, 222 U. S. 538, the court did no more than to approve the action of a petitioner in bankruptcy who had, after the filing of his petition but before adjudication and before appointment of a trustee, instituted a suit to protect the assets of his estate. *In re Prudence Bond Corporation*, 75 F. 2d 262, is cited because in that case, in discussing the question of jurisdiction, the court stated that Congress did not intend the bankruptcy court in proceedings under § 77B to take over all litigation between a

2. *Johnson* v. *Collier*, 222 U. S. 538; *Paradise* v. *Vogtlandische Maschinen-Fabrik*, 99 F. 2d 53; *Bluegrass Canning Co.* v. *Steward*, 175 Fed. 537; *In re Prudence Bond Corporation*, 75 F. 2d 262; *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. 2d 363; *Thompson* v. *Terminal Shares*, 104 F. 2d 1; *Boston Elevated Ry. Co.* v. *Paul Bouton Co.*, 211 Fed. 812; *Missouri, K. & T. Trust Co.* v. *German National Bank*, 77 Fed. 117; and *Hartford Accident & Indemnity Co.* v. *Federal Bond & Mtge. Co.*, 59 F. 2d 950; *Thatcher* v. *Rockwell*, 105 U. S. 467; *Bennett* v. *Associated Theatres Corp.*, 226 N. W. 239; and *Griffin* v. *Mutual Life Ins. Co.*, 46 S. E. 870.

debtor and third persons. The facts were that *Prudence* filed its petition under § 77B of the Bankruptcy Act, and the court appointed trustees. Radin, the holder of one of *Prudence's* bonds, filed a suit in a state court against the indenture trustee for an accounting of income from the pledged mortgages. The District Court stayed the prosecution of the suit and Radin appealed. In affirming, the appellate court stated that the order was merely ancillary to preserve the pledge *pendente lite;* to prevent its dissipation in accordance with the terms of the deed.

The case of *Thompson* v. *Terminal Shares*, 104 F. 2d 1, is cited as tending to show that there was little or no enlargement of the jurisdiction of the reorganization court under § 77. Even so, the case did not involve the prosecution of a claim by anyone else than Thompson. The facts were that Thompson, as trustee, sought to bring into the reorganization court the owners of property against which Thompson was asserting a claim. True, Thompson contended that by the language of § 77(a) the jurisdiction of the reorganization court was enlarged so as to allow suit to be brought in that court claiming title to property adversely to the debtor even though the property and the defendants claiming adversely were not within the court's jurisdiction, but the net result of that case is that the court held it did not have jurisdiction to reach the claimed asset by a summary proceeding.

Neither in *Thatcher* v. *Rockwell*, 105 U. S. 467; *Boston Elevated Ry. Co.* v. *Paul Boyton Co.*, 211 Fed. 812; *Bennett* v. *Associated Theatres Corporation*, 226 N. W. 239; and *Griffin* v. *Mutual Life Ins. Co.*, 46 S. E. 870, nor in any of the other cases cited by claimant, were there statutes making applicable the "exclusive jurisdiction" clause in § 77(a).

It will not be necessary to discuss the other cases cited since they, too, are inapplicable or are distinguishable on the facts.

While it is true that a corporation is a distinct entity from its stockholders and all the corporate powers and rights including the right to sue in its own name are vested in the corporation and not in the stockholders, yet it is well settled that under certain circumstances a stockholder may sue to protect his interests in the corporation, such as in the case where the stockholder sues to enforce a cause of action in favor of the corporation arising from failure

of the directors of the corporation to perform their duty in respect to the cause of action, but such a suit is still a suit to enforce a right of the corporation, *Porter* v. *Sabin*, 149 U. S. 473; *Kelly* v. *Dolan*, 233 Fed. 635, and when the corporation becomes insolvent and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce a cause of action and all other rights of property of the corporation vest in the receiver, and he is the proper party to bring suit, *Porter* v. *Sabin, supra*, 478; *Klein* v. *Peter*, 284 Fed. 797; and *Reagan* v. *Midland Packing Co.*, 8 F. 2d 954. Upon the appointment and qualification of the receiver, the estate of the insolvent corporation including all its rights of action, pass into the custody of the law, and its administration is wholly under the control of the court by its receiver, *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, and he and he alone (in this case, the trustee) is the proper party to maintain suits for the recovery of any money due to the corporation. If the court must pass upon the desirability of filing a corporate claim, it is of equal importance that it pass upon the desirability of proceeding with the suit, *Adler* v. *Seaman*, 266 Fed. 828, and *Seaman* v. *McCulloch*, 8 F. 2d 820; consequently, the continuance without court permission of a prosecution previously begun is equally inconsistent with those powers of exclusive management.

The question remains whether what we have said is applicable to reorganization proceedings under § 77 of the Bankruptcy Act. We have already observed that when a trustee is appointed he shall have all the title and shall exercise all the powers of a trustee appointed pursuant to any section of this title, 11 U. S. C. A. § 205 (c) (2); hence we see no reason why it should not apply.

For the reasons stated, the order of the District Court is

AFFIRMED.

Endorsed: Filed June 6, 1945. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the sixth day of June, 1945, the following further proceedings were had and entered of record, to-wit:

Wednesday, June 6, 1945.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

In the Matter of:
The Chicago, Rock Island and Pacific Railway Company,
Debtor.

Walter E. Meyer,
Claimant-Appellant,
8585 *vs.*
Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered adjudged and decreed by this Court that the order of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs.

And afterwards, to-wit: On the fifth day of July, 1945, the following further proceedings were had and entered of record, to-wit:

Thursday, July 5, 1945.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

In the Matter of:
The Chicago, Rock Island and Pacific Railway Company,
Debtor.

Walter E. Meyer,
Claimant-Appellant,
8585 *vs.*
Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the twentieth day of July, 1945, there was filed in the office of the Clerk of this Court, a Designation for Supreme Court record which said designation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 8585.

In the Matter of:
The Chicago, Rock Island and Pacific Railway Company,
Debtor.

Walter E. Meyer,
Appellant,

vs.

Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

DESIGNATION FOR SUPREME COURT RECORD

To the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit:

Please prepare a certified transcript of the proceedings in the above entitled matter for use on a petition for writ of certiorari, including the following:

1. Order taking cause under advisement;
2. Opinion;
3. Judgment;
4. Order staying the mandate.

Dated: July 19, 1945.

Walter E. Meyer,
Appellant Pro Se.
31 Nassau Street,
New York 5, N. Y.

Sonnenschein, Berkson, Lautmann, Levinson & Morse,
Attorneys for Appellant,
77 West Washington Street,
Chicago 2, Illinois.

Endorsed: Filed July 20, 1945. Kenneth J. Carrick, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of proceedings had and papers filed as called for by the designation for record on petition for writ of Certiorari, filed on the twentieth day of July, 1945, in:

Cause No. 8585.

In the Matter of: The Chicago, Rock Island and Pacific Railway Company,

Debtor.

Walter E. Meyer,

Claimant-Appellant,

vs.

Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,

Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of July, A. D. 1945.

(Seal)

(Signed) Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 22, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter and Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 31
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 392

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

WALTER E. MEYER,
Petitioner, *Pro Se*,
31 Nassau Street,
New York 5, N. Y.

SONNENSCHEIN, BERKSON, LAUTMANN,
LEVINSON & MORSE,
Attorneys for Petitioner,
77 West Washington Street,
Chicago 2, Illinois.

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Argument:

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A stockholder who filed a claim for the benefit of his railroad in the reorganization proceedings of another railroad is not precluded from continuing to prosecute the claim by reason of the subsequent reorganization proceedings of his railroad and the appointment of a trustee therein, there being no action on the part of that trustee to take over or restrain the prosecution of the claim 11

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Thompson v. *Terminal Shares* (C. C. A. 8), 104 F. (2d) 1 (cert. denied 308 U. S. 559), recites the legislative history of subsection (a) and the amendments thereto, and construes the language in question in a manner at variance with its construction by the Circuit Court of Appeals herein 16

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It is important to corporations in reorganization, in order that they may not be deprived of valuable assets, that the decision herein be reversed 23

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Statement of Matter Involved

Your petitioner, a large stockholder and at the time a director of St. Louis Southwestern Railway Company

(hereinafter referred to as "St. Louis Southwestern"), on April 26, 1934, filed a claim for the benefit of St. Louis Southwestern, in proceedings under Section 77 of the Bankruptcy Act for the reorganization of The Chicago, Rock Island & Pacific Railway Company (hereinafter referred to as "Rock Island" or "debtor") instituted in the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 2).

The claim is in the amount of $31,593,874, $29,126,874 being for damages arising out of successive conspiracies in which Rock Island was alleged to have participated, by which St. Louis Southwestern was wrongfully and illegally controlled from March 11, 1925, to June 7, 1933, the date of the initiation of the Rock Island reorganization proceedings, and $2,467,000 being the amount for which it is asked that Rock Island account to St. Louis Southwestern for profits which Rock Island realized in dealings in the stock of St. Louis Southwestern while illegally controlling that company (R. 2-7).

The claim was filed by petitioner in behalf of St. Louis Southwestern because at that time Southern Pacific Company controlled St. Louis Southwestern, and Southern Pacific Company and the directors of St. Louis Southwestern were co-conspirators with Rock Island in connection with the conspiracies by which St. Louis Southwestern was damaged (R. 3).

The trustees of Rock Island, respondents herein, on May 25, 1935, filed objections in the nature of a general denial of the said claim (R. 7).

On December 12, 1935, a year and a half after the filing of the claim, St. Louis Southwestern filed a petition for reorganization, under Section 77 of the Bankruptcy Act, in the United States District Court for the Eastern Judicial District of Missouri, Eastern Division. The Court

approved the petition, and on January 3, 1936, appointed a trustee for the company (R. 51).

Among the objections filed thereafter by the respondents was the objection that petitioner could no longer prosecute the claim because, by reason of the reorganization proceedings and the appointment of a trustee of St. Louis Southwestern, title to the causes of action set forth in said claim became vested in that trustee (R. 8).

The trustee of St. Louis Southwestern has made no step to take over the claim or to enjoin its prosecution by petitioner, nor have the respondents alleged that he has done so.

The claim having been referred to a Special Master, respondents and petitioner requested that the Special Master, before entering upon a hearing on the merits, first dispose of the objection of the respondents which raised the issue of petitioner's right to further prosecute the claim (R. 34, 50).

On February 2, 1942, the Special Master filed his report (R. 34-44) and supplemental report (R. 44-47), finding and concluding that petitioner should not be allowed to continue to prosecute the claim.

On February 7, 1944, the District Court entered its order approving the reports of the Special Master (R. 49-52), and on June 6, 1945, the Circuit Court of Appeals affirmed the order of the District Court (R. 61-66).

The Circuit Court of Appeals held that after the institution of reorganization proceedings and the appointment of a trustee of St. Louis Southwestern petitioner could no longer prosecute the claim. It based its decision, as had the District Court, on subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act (R. 63).

Subsection (a) provides that the reorganization court shall have "exclusive jurisdiction of the debtor and its

property wherever located" and "in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Subsection (c)(2) confers upon the trustee in a Section 77 proceeding the title and powers of a trustee "appointed pursuant to section 72 or any other section of this title [11 U. S. C. A.], and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, * * *"

The Circuit Court was of the opinion that "the continuance without court permission" of the prosecution of the claim filed previous to reorganization proceedings was "inconsistent with those powers of exclusive management" (R. 65).

It is submitted that the Circuit Court wrongly construed subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act, and that there is nothing in these subsections or in any other part of Section 77 which precludes the continued prosecution of the claim by petitioner.

Jurisdiction

The judgment of the United States Circuit Court of Appeals was entered on June 6, 1945 (R. 66).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code [28 U. S. C. A. 347(a)], as amended.

The Question Presented

A stockholder of a railroad corporation filed a claim for the benefit of his railroad in the reorganization proceedings of another railroad. Thereafter, the railroad for-

the benefit of which the claim was filed went into reorganization and a trustee was appointed. There being no action on the part of said trustee to take-over or restrain the prosecution of said claim, may the trustees of the railroad against which the claim was filed raise the objection that the initiation of reorganization proceedings and the appointment of a trustee of the railroad for the benefit of which the claim was filed, by virtue of subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act, preclude the continued prosecution of the claim by the stockholder?

Statute Involved.

The statute involved is Section 77 of the Bankruptcy Act, and particularly subsections (a), (c)(2) and (*l*) thereof [11 U. S. C. A. 205 (a), (c)(2) and (*l*)]. The pertinent language of said subsections is printed in the Appendix, pages 26-27 hereof.

Reasons Relied on for Allowance of the Writ

1. The Circuit Court of Appeals in holding, upon the objection of the respondents, the trustees of Rock Island, that petitioner, a stockholder of St. Louis Southwestern, under subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act was prevented from continuing to prosecute a claim filed by him in behalf of St. Louis Southwestern in the Rock Island reorganization proceedings previous to the initiation of proceedings for reorganization of St. Louis Southwestern, decided an important question of Federal law which has not been but should be settled by this Court.

2. The Circuit Court of Appeals in so holding decided a Federal question in a way probably in conflict with applicable decisions of this Court.

3. The Circuit Court of Appeals in so holding rendered a decision in conflict with decisions of the Circuit Court of Appeals for the Second Circuit, and probably in conflict with decisions of the Circuit Courts of Appeals for the Eighth, Ninth and Third Circuits respectively.

It is important that the Supreme Court pass upon the language of the statute in question inasmuch as the decision of the Circuit Court below affects the right of railroad corporations in reorganization proceedings under Section 77 and also other corporations under Chapter X of the Bankruptcy Act (formerly Section 77B), and of stockholders in representative actions in behalf of such corporations, to continue to prosecute suits begun or claims filed previous to such reorganization proceedings and the appointment of a trustee.

The erroneous construction of said statute, if allowed to stand, will have the effect, in the absence of any action by the trustee, of hindering and preventing corporations in reorganization and their stockholders from asserting causes of action under the circumstances above set forth.

The special reason why a reversal of the decision is important to security holders of many railroads now in reorganization arises out of the fact that one of the purposes of the enactment of Section 77 was to do away with the abuses of receivership proceedings by which too often those legally liable for wrecking the railroads escaped all liability. The decision herein tends to continue such evil.

A reversal of the decision is important to St. Louis Southwestern because the claim constitutes a valuable asset of that company. This appears from the record in the case. Additional proof as to this is shown by the action of the United States in the appeal by petitioner and others to the Circuit Court of Appeals for the Eighth Circuit from the decision of the District Court approving

the plan of reorganization of St. Louis Southwestern, *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914.

In March 1945 the Government, through its Attorney General, filed a brief as *amicus curiae* in the said appeal, in which it asked that the claim of Southern Pacific as a creditor in the principal amount of $17,882,250, and as a stockholder owning 87% of the stock of St. Louis Southwestern, be subordinated to the interest of the minority stockholders on the ground that the control exercised by Kansas City Southern over St. Louis Southwestern was unlawful, and "that the debtor had a valuable cause of action for triple damages under the antitrust laws which it was prevented from bringing during its subsequent control by Southern Pacific." Rock Island was a co-conspirator with Kansas City Southern and others in the illegal control exercised over St. Louis Southwestern by Kansas City Southern referred to in the Government's brief, and petitioner so alleged in the claim filed herein.

In view of the meritorious and substantial nature of the claim, if the decision of the Circuit Court of Appeals herein is allowed to stand it will work a grave injustice to St. Louis Southwestern and to the many thousands of its security holders.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8585, In the Matter of: The Chicago, Rock Island and Pacific Railway Company, Debtor; Walter E. Meyer, Appellant, vs. Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company, Appellees, to the

end that this cause may be reviewed and determined by this Honorable Court, and that the judgment of the said Circuit Court of Appeals be reversed; and that your petitioner have such other and further relief as may seem proper.

Dated, New York, August 30, 1945.

WALTER E. MEYER,
Petitioner, *Pro Se.*

SONNENSCHEIN, BERKSON, LAUTMANN,
LEVINSON & MORSE,
Attorneys for Petitioner.

IN THE

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OCTOBER TERM, 1945.

No.

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

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vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinions of the Courts Below

The opinion of the Circuit Court of Appeals (R. 61-65) is reported in 149 F. (2d) 529.

The opinion of the District Court (R. 49-52) is not reported.

Statement

The statement of the case set forth in the petition under the heading "Statement of Matter Involved" is hereby adopted and made part of this brief.

Specification of Errors

The Circuit Court of Appeals erred:

1. In affirming the order of the District Court holding that petitioner had no right to continue to prosecute the claim herein and disallowing the claim.

2. In holding, upon the objections of the respondents that all causes of action belonging to St. Louis Southwestern vested in the trustee of that company, that petitioner, a stockholder of St. Louis Southwestern, without any action on the part of said trustee to take over or restrain the prosecution of the claim, was precluded from continuing to prosecute the claim which was filed by him for the benefit of that company in the Rock Island reorganization proceedings previous to the institution of reorganization proceedings of St. Louis Southwestern.

3. In holding that, because under subsection (a) of Section 77 of the Bankruptcy Act the reorganization court is given "exclusive jurisdiction of the debtor and its property wherever located" and "in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose," on that account petitioner, after the institution of reorganization proceedings and the appointment of a trustee for St. Louis Southwestern, was precluded from continuing to prosecute the claim.

4. In holding that because under subsection (c)(2) of Section 77 the trustee of St. Louis Southwestern was given "all the title" and "all of the powers of a trustee appointed pursuant to Section 72 or any other section of this title [11 U. S. C. A.], and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding," on that account petitioner was precluded from prosecuting the claim.

5. In failing to take into consideration subsection (*l*) of Section 77, which sets forth that in railroad reorganization proceedings "the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed," and by reason of the failure to do so, holding that petitioner was precluded from prosecuting the claim.

ARGUMENT

A stockholder who filed a claim for the benefit of his railroad in the reorganization proceedings of another railroad is not precluded from continuing to prosecute the claim by reason of the subsequent reorganization proceedings of his railroad and the appointment of a trustee therein, there being no action on the part of that trustee to take over or restrain the prosecution of the claim.

The Circuit Court of Appeals held, upon the objections of the respondents, that by virtue of subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act, petitioner had no right to continue to prosecute a claim filed by him as a stockholder of St. Louis Southwestern for the benefit of said company in the Rock Island reorganization proceedings (R. 66).

The claim had been filed previous to the initiation of the proceedings for reorganization and the appointment of a trustee for St. Louis Southwestern, and said trustee had made no step whatsoever to take over the claim or to enjoin its prosecution by petitioner.

Petitioner submits that under these circumstances the appointment of a trustee for St. Louis Southwestern could not be pleaded by the respondents as a defense to the claim.

It is settled law that if the trustee has not taken over or endeavored to enjoin the prosecution of a suit brought by a bankrupt, and pending at the time of the bankruptcy, it may not be pleaded as a defense that the appointment of the trustee vested such title in him as to abate the suit:

Johnson v. *Collier*, 222 U. S. 538, 540;
Paradise v. *Vogtlandische Maschinen-Fabrik*, (C. C. A. 3), 99 F. (2d) 53, 55;
Bluegrass Canning Co. v. *Steward* (C. C. A. 6), 175 Fed. 537, 543-544;
Thatcher v. *Rockwell*, 105 U. S. 467, 470;
Van der Stegen v. *Neuss, Hesslein & Co.*, 270 N. Y. 55, 59-60;
Bennett v. *Associated Theaters*, 247 Mich. 493, 496;
Griffin v. *Mutual Life Ins. Co.*, 119 Ga. 664, 665;
Collier on Bankruptcy, 14th ed., vol. 1, pp. 1173, *et seq.*

It is also the law that if a receiver in equity under similar circumstances does not act, it may not be pleaded by way of defense that the appointment of the receiver abates the suit:

Boston Elevated Ry. Co. v. *Paul Boyton Co.*, (C. C. A. 1), 211 Fed. 812, 822-823;

Missouri, K. & T. Trust Co. v. *German Nat. Bank* (C. C. A. 8), 77 Fed. 117, 122-123;
Hartford Accident & Indemnity Co. v. *Federal Bond & Mtge. Co.* (C. C. A. 8), 59 F. (2d) 950, 956;
Grimes Savings Bank v. *McHarg*, 217 Iowa 636, 640.

There is no valid reason for any distinction in the application of this rule between a suit brought by a corporation and a suit brought by a stockholder for the benefit of his corporation, and the rule has been applied accordingly in stockholder's suits. *Friederich W. Meyer* v. *Page*, 112 App. Div. (N. Y.) 625; *McAnarney* v. *Lembeck*, 97 N. J. Eq. 361.

The Circuit Court of Appeals herein held that the jurisdiction and power conferred upon the reorganization court under Section 77 of the Bankruptcy Act, including subsection (a) which confers upon the court "exclusive jurisdiction of the debtor and its property wherever located", served to differentiate the law in reorganization proceedings from the law in the ordinary bankruptcy or equity receivership in such a way as to preclude the continued prosecution of the claim herein.

In this the Circuit Court of Appeals erred.

The bankruptcy court has always had exclusive jurisdiction of the bankrupt estate, and upon adjudication title to the property of the bankrupt has vested in the trustee, whether such property was situated within or without the district in which the bankruptcy court sat. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737. See also *Ex Parte Baldwin*, 291 U. S. 610, 615.

Section 77 relating to the reorganization of railroad corporations was enacted in 1933. Section 77B relating to the reorganization of non-railroad corporations was en-

acted in 1934. The provision giving the court the powers of a Federal court which had appointed a receiver first appeared in subsection (a) of Section 77B.

In 1935 Section 77 was amended, Congress adopting recommendations contained in a report made in 1934 by the late Joseph B. Eastman, Federal Coordinator of Transportation (House Doc. 89, 74th Cong., 1st. Sess.). Mr. Eastman referred to the enactment of Section 77B in 1934, stating that it was based "upon Section 77, but incorporated many minor changes" which "where appropriate, should be adopted" (pp. 102-103). Included in the amendments to Section 77 was the provision of subsection (a) conferring upon the court the powers of a Federal court which had appointed a receiver. The provision, "Process of the court shall extend to and be valid when served in any judicial district," and the provision for the promulgation by the Supreme Court of rules relating to the service of process outside the judicial district, were also added at this time.

Subsection (a) should be read together with subsection (*l*) of Section 77 which provides:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

The statement that the rights "of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed" would indicate that it was the intention of Congress to guard against the kind of misconstruction of the statute of which the decision of the Circuit Court of Appeals herein is an example.

After the enactment of subsection (a) of Section 77 in its original form, declaring that the reorganization court shall "have exclusive jurisdiction of the debtor and its property wherever located," without, however, the additions thereto subsequently enacted, the Supreme Court in *Ex Parte Baldwin,* 291 U. S. 610, discussed at length (pp. 615 *et seq.*) the jurisdiction of the court.

In that case the trustees of the Missouri Pacific Railroad System, in reorganization in Missouri under Section 77, petitioned the Supreme Court for a writ of mandamus to compel the Federal court for Southern Texas, upon their petition for removal, to take jurisdiction of a suit brought against them in a Texas state court. In holding that the existence of a remedy by injunction of the court in which proceedings for reorganization were pending against the prosecution of the suit in the state court required the denial of the petition for mandamus, the Supreme Court stated that a bankruptcy court had exclusive jurisdiction, and that it could not only issue all writs necessary to protect its possession from physical interference, but was entitled to determine all questions respecting the same; that the jurisdiction was exclusive of the jurisdiction of other courts, and this "regardless of whether the property was located in the district in which the bankruptcy proceeding originated."

The Court in its opinion did not specifically refer to the language in subsection (a) as to the exclusive jurisdiction of the reorganization court. It rested its argument upon the general principle that where a court of competent jurisdiction takes property into its possession, the property is thereby withdrawn from the jurisdiction of other courts (p. 615).

In *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, the Supreme Court construed subsection (a) without the amendments, holding that the bankruptcy court in granting an injunc-

tion to safeguard conceded assets of the trust estate outside its district "was well within its power, either as a virtual court of equity, or under the broad provisions of § 2 (15) of the Bankruptcy Act or of § 262 of the Judicial Code, U. S. C. title 28, § 377" (p. 676). The Court discussed the propriety as distinct from the power of the bankruptcy court to take such action, and held that the injunction was "within the contemplation of § 77, and we need not inquire whether it would be admissible under the act in force prior to the adoption of that section" (p. 677).

In *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, the Supreme Court again discussed the meaning of exclusive jurisdiction in a railroad reorganization case (p. 483), citing *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, *supra*, and made no reference to the language in subsection (a) of Section 77.

See also *Warren* v. *Palmer*, 310 U. S. 132.

It is apparent from these decisions that in the opinion of the Supreme Court the language of subsection (a) worked no such radical modification in the jurisdiction hitherto exercised by the bankruptcy court as would appear from the opinion of the Circuit Court of Appeals herein.

Subsection (a) in its amended form was construed in *Thompson* v. *Terminal Shares* (C. C. A. 8), 104 F. (2d) 1, cert. denied 308 U. S. 559.

The question there involved was whether the railroad reorganization court had jurisdiction to entertain a suit against non-resident defendants, involving property outside the district held adversely to the bankrupt estate. It was held that the court was without power to entertain such a suit.

The Court held, Judge Sanborn writing, that the jurisdiction conferred by Section 77 was to be considered

"the traditional jurisdiction" of the bankruptcy court "over the property of a bankrupt, wherever located, freed, however, from those limitations which made ancillary proceedings in other districts necessary, and with the powers which Federal equity courts exercise in receivership proceedings, so far as those powers may be necessary or appropriate in order to preserve and safeguard the property in the actual or constructive possession of debtors and in order to carry on their business pending reorganization" (p. 9).

The language of subsection (a), Judge Sanborn stated, should be considered in connection with subsection (*l*) of Section 77, and must be "read in the light of the legislative history of Section 77 and of long established Congressional policy" (pp. 4-5).

He pointed out that while the *Continental Illinois National Bank & Trust Co.* case (*supra*) was pending in the Supreme Court, there being doubt as to its decision, the provision was added which gave the court the powers "not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity," and also the provisions rendering the process of the court valid in jurisdictions other than in the reorganization court district.

Referring to the report of Mr. Eastman on which the amendments to Section 77 were based, Judge Sanborn stated that that report nowhere contained any suggestion that "the proposed amendments relating to jurisdiction were intended to confer any additional powers upon the courts of bankruptcy with respect to the reorganization of railroads" (p. 7).

In addition to subsection (a), the Circuit Court of Appeals herein also relied on subsection (c)(2) of Section 77, to the effect that the trustee "shall have all the title and shall exercise • • • all of the powers of a trustee

appointed pursuant to section 72* or any other section of this title [11 U. S. C. A.], and, to the extent not inconsistent with this section, *if authorized by the judge*, the powers of a receiver in an equity proceeding."

The trustee in his title to the debtor's property and in his powers is necessarily limited by the jurisdiction and powers of the court of which he is an officer.

Moreover, Section 72 (of 11 U. S. C. A.) has to do with the appointment of trustees in ordinary bankruptcy proceedings. The trustee under Section 77 by these words is thus given no more power than is given to a trustee in the ordinary bankruptcy proceeding.

As to "the powers of a receiver in an equity proceeding" "to the extent not inconsistent with this section", which, as appears from the above language of the statute, it is left entirely to the discretion of the judge to withhold from or to confer upon the trustee, there is nothing in the record to show that the reorganization court gave such powers to the St. Louis Southwestern trustee. But assuming that the trustee had been given the powers of a receiver, inasmuch as the appointment of a receiver does not preclude the continued prosecution of a suit under the circumstances of this case (see p. 12, *supra*), it follows that conferring upon the trustee the powers of a receiver could not do so.

It is expressly stated in subsection (c) (2), that the title and powers given the trustee shall be given to the extent *not inconsistent with Section 77*. In view of the fact that subsection (*l*) of Section 77 provides that the rights "of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed", it is plain that any title

* Section 72 of 11 U. S. C. A. is reproduced in full in the Appendix, pages 29-30.

or any powers conferred upon the trustee could in no way affect the right of the petitioner to continue to prosecute the claim.

Section 77B contained language similar to that in Section 77 (a), (c)(2) and (*l*) herein discussed, the corresponding subsections of Section 77B being (a), (c)(2) and (o).* The substance of these provisions of former Section 77B was retained in Chapter X of the Bankruptcy Act (See Sections 111, 115, 186, 187, 112, 114 and 200.)*

The language in Section 77B as to the jurisdiction of the court was construed in *In re Prudence Bonds Corp.* (C. C. A. 2), 75 F. (2d) 262, 263; *In re Prudence Co.* (C. C. A. 2), 96 F. (2d) 157, 159, cert. denied 305 U. S. 616; *United States* v. *Tacoma Oriental S. S. Co.* (C. C. A. 9), 86 F. (2d) 363, 368; and *In re Standard Gas & Electric Co.* (C. C. A. 3), 119 F. (2d) 658, 661.

In *In re Prudence Bonds Corp.*, 75 F. (2d) 262, which is referred to by the Circuit Court of Appeals herein (R. 64), after the appointment of trustees of the Prudence Corporation under Section 77B, a holder of a Prudence note filed a suit in a state court against the indenture trustee for an accounting of income from the pledged mortgages. The reorganization court stayed the prosecution of the suit on the petition of the indenture trustee. The Circuit Court of Appeals for the Second Circuit, consisting of Judges Learned Hand, Swan and Chase, Judge Hand writing, construed the language in Section 77B (a) as to exclusive jurisdiction and also Section 77B (o) (corresponding to subsection (*l*) of Section 77), stating (p. 263):

> "It is clear both from the language used in these subdivisions, and from the consequences of a contrary ruling, that Congress did not intend the bankruptcy court in proceedings under Section 77B to

*Reprinted in the Appendix, pages 27-29.

take over all litigation between the debtor and third persons."

The opinion of the Circuit Court herein (R. 64) fails to bring out that the stay in the said *Prudence* case was granted by the *reorganization court* on the ground that the suit would interfere with its disposition of the estate. The assertion of the claim herein in no wise interferes with the St. Louis Southwestern reorganization proceedings, nor has the St. Louis Southwestern reorganization court enjoined the continued prosecution of the claim.

Later, in *In re Prudence Co.*, 96 F. (2d) 157, the Circuit Court of Appeals for the Second Circuit allowed a pending suit to be continued after the appointment of the trustees. The matter came up before Judges Manton, Swan and Chase, two of whom, as has been indicated, participated in the decision in *In re Prudence Bonds Corp., supra.* The trustees had proposed that the attorney who acted for the bankrupt become their attorney and continue the litigation, his compensation to be determined by the bankruptcy court. This proposal the attorney declined to accept, continuing the litigation in the name of the corporation on the basis of his original retainer. The Circuit Court (p. 159) held that the filing of the petition did not terminate his employment nor stay the pending suit; that while under 11 U. S. C. A., Section 29 (c), the trustees had the right to take over the prosecution of the suit, they also had the right to allow the suit to be continued by the bankrupt and later claim the fruits of any recovery. The Court continued:

> "In the case at bar the debtor's trustees chose the latter course. They did not intervene in the pending suit, nor employ Mr. Davison as their attorney; they merely allowed him to perform his contract of retainer with the debtor."

The decision of the Circuit Court of Appeals for the Second Circuit in *Meyer* v. *Kansas City Southern*, a suit

brought by this petitioner as a stockholder of St. Louis Southwestern for the benefit of that company, supports the position taken by him herein. In that case the District Court for the Southern District of New York on September 6, 1935, dismissed the complaint, not on the merits but on the ground that the court did not have subject matter jurisdiction. St. Louis Southwestern filed its petition for reorganization on December 12, 1935, and a trustee was appointed on January 3, 1936 (R. 50). The Circuit Court of Appeals in its decision, rendered on June 22, 1936, refers to the appointment of a trustee of St. Louis Southwestern (p. 414), but does not suggest that such appointment abated the representative action brought by petitioner and thus prevented the prosecution of the appeal. *Meyer* v. *Kansas City Southern*, 84 F. (2d) 411, aff'g 11 F. Supp. 937, cert. denied 299 U. S. 607.*

The decision of the Circuit Court of Appeals herein is clearly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Prudence Co.*, 96 F. (2d) 157, the dictum of that court in *In re Prudence Bonds Corporation*, 75 F. (2d) 262, and its decision in *Meyer* v. *Kansas City Southern*, 84 F. (2d) 411; and is probably in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Thompson* v. *Terminal Shares*, 104 F. (2d) 1, for the Ninth Circuit in *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363, and for the Third Circuit in *In re Standard Gas & Electric Co.*, 119 F. (2d) 658.

The Circuit Court of Appeals was under a misapprehension in stating that petitioner contended that, because "the procedure in interstate railroad reorganization under § 77 is substantially that of an equity receivership the

* Though it does not appear in the record herein, the fact is that after the appointment of the trustee the St. Louis Southwestern moved to stay the appeal. The Circuit Court of Appeals refused to grant the stay. The appeal was argued May 20, 1936.

appointment of the trustee did not prevent the continued prosecution" of the claim herein (R. 63). Nor did petitioner cite the cases there listed in the margin in support of such contention. Petitioner's contentions before the Circuit Court and the cases cited by him in support thereof do not differ from those set forth in this brief, save that in this brief, he has cited some additional cases.

As has been shown, where suits have been begun before the appointment of a trustee or receiver the courts have not allowed a defendant to plead the appointment of the trustee or receiver as a defense.

Porter v. *Sabin*, 149 U. S. 473; *Klein* v. *Peter*, 284 Fed. 797; and *Kelly* v. *Dolan*, 233 Fed. 635, cited by the Circuit Court of Appeals herein (R. 65), were all cases where a stockholder brought suit *after* the appointment of a receiver for the corporation. *Reagan* v. *Midland Packing Co.*, 8 F. (2d) 954, also cited by the Court (R. 65), was a case where a judgment-creditor of a corporation brought suit *after* a receiver had been appointed.

The Circuit Court cites *Adler* v. *Seaman*, 266 Fed. 828, and *Seaman* v. *McCulloch*, 8 F. (2d) 820, as indicating the necessity of the court's passing upon the desirability of proceeding with a suit (R. 65).

The facts in these cases were that while a stockholder's suit was pending in the District Court, seeking the appointment of a receiver of the corporation and injunctive relief against the directors, a bondholder brought suit in the same court also asking for the appointment of a receiver. The company contested the stockholder's suit, but consented to the appointment of a receiver in the bondholder's suit. The Court allowed the two suits to be consolidated. The Circuit Court of Appeals reversed on the ground that the consolidation was improper. Thereafter the representative action brought by the stockholder was dismissed.

In the *Seaman* cases the facts were wholly different from the facts in this case. In *Seaman* v. *McCulloch*, the Circuit Court stated (p. 826) that the recovery sought in the stockholder's action was involved with certain power contracts and that the receiver's "functioning might be vitally affected by the disposition of these contracts." Moreover, the Court stated that the appointment of the receiver "did not *ipso facto, et eo instanti*, abate" the stockholder's action. The instant claim is not against St. Louis Southwestern and its directors. It was filed by petitioner in the Rock Island reorganization court and is for the benefit of St. Louis Southwestern. It can in no way be said to be interfering with the functioning of the trustee of St. Louis Southwestern.

It is a matter of importance to all corporations in reorganization and their security holders that the decision herein be reversed, and that the rule which permits the continued prosecution of a suit or claim under the circumstances previously outlined should continue in effect.

That rule is supported by practical considerations. The trustee or receiver in equity has the power to take over the prosecution of the suit or claim, but he may choose not to do so. This may be because he believes that the chances of success are not good and he does not desire to incur the expense of what he considers will be fruitless litigation (*Johnson* v. *Collier*, 222 U. S. 538, at p. 540; *Paradise* v. *Vogtlandische Maschinen-Fabrik* (C. C. A. 3), 99 F. (2d) 53, at p. 55), or for other reasons; *In re Prudence Co.* (C. C. A. 2), 96 F. (2d) 157; *Bluegrass Canning Co.* v. *Steward* (C. C. A. 6), 175 Fed. 537).

Often the trustee may not have the intimate knowledge of the facts or the zeal and persistence necessary for the successful prosecution of arduous litigation, or he may be reluctant to undertake litigation against those connected with the management of the corporation or against others. Such a trustee may not be willing ex-

pressly to authorize the continued prosecution of a suit by the corporation or a stockholder; yet he may also be unwilling to take the responsibility of restraining its prosecution.

Under the rule that has hitherto prevailed, as has been brought out, causes of action constituting valuable assets, which would otherwise be lost, are thus preserved. In the event of a recovery, all the benefits accrue to the bankrupt estate or corporation in receivership and this without the trustee or receiver incurring the often heavy burden and expense involved in the conduct of the litigation.

There are special reasons why a reversal of the decision is important to the many railroads now in reorganization and to their security holders.

Among the purposes of the enactment of Section 77 was the elimination of the abuses of equity receivership proceedings by which those legally liable for the wrecking of railroads too often escaped all liability (72nd Cong., 2d Sess., Cong. Rec., Vol. 76, pp. 2916, 4887, 5358). The decision herein is contrary to this purpose of the statute, and will be a source of encouragement to powerful financial interests in continuing to flout the law.

The claim filed by your petitioner constitutes a valuable asset to St. Louis Southwestern which will be lost if the decision is allowed to stand. Its meritorious and substantial nature is apparent from the allegations of petitioner in his proof of claim (R. 2-7); his Reply to the "New Matter in Support of Objections" filed by the Rock Island trustees (R. 10-15); and the dissenting opinion of Chairman Eastman in *St. Louis S. W. Ry. Co. Reorganization*, 249 I. C. C. 5, at page 177 *et seq.* (R. 15-33).

In his dissent Chairman Eastman showed that he was of the opinion that petitioner in the hearings before the Interstate Commerce Commission in the St. Louis Southwestern reorganization proceedings to a very large extent

had sustained the charges in his petition for investigation as to the illegal and wrongful control exercised over St. Louis Southwestern, and that the Commission should have granted the said petition. Referring to the part played by Rock Island in the undoing of St. Louis Southwestern, the Chairman stated that the downfall of St. Louis Southwestern began when Rock Island first acquired a dominant stock interest in the property in March 1925 (R. 17).

The United States, through the Attorney General, has recorded its belief in petitioner's charges in respect to the illegal control exercised over St. Louis Southwestern in filing a brief as *amicus curiae* in the appeal now pending in the Circuit Court of Appeals for the Eighth Circuit from the decision of the District Court approving the Commission's plan of reorganization of St. Louis Southwestern. The Government asks that because Southern Pacific, a large creditor and controlling stockholder of St. Louis Southwestern, did not permit that company to assert the cause of action which it had against Kansas City Southern, Southern Pacific should be subordinated to the interest of the minority stockholders in the plan of reorganization of St. Louis Southwestern (Petition, pp. 6-7). As appears from the claim herein, petitioner charged that Southern Pacific and Rock Island were co-conspirators with Kansas City Southern in the illegal control exercised by Kansas City Southern over St. Louis Southwestern by which St. Louis Southwestern was damaged (R. 4).

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, August 30, 1945.

Respectfully submitted,

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Appendix.

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U. S. C. A. 205) are as follows:

"(a) * * * If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending; and any other rules which it may deem advisable in order to aid district courts and circuit courts of appeal in exercising the jurisdiction herein conferred upon them. * * *"

"(c)(2) * * * The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor. * * *"

"(*l*) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and li-

abilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

The corresponding provisions of Section 77B of the Bankruptcy Act (11 U. S. C. A. 207) were as follows:

"(a) * * * If the petition or answer is so approved, an order of adjudication in bankruptcy shall not be entered and the court in which such order approving the petition or answer is entered shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section, and shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature. * * *"

"(c)(2) * * * every such trustee, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all the powers of a trustee appointed pursuant to section 72 of this Act, and if authorized by the judge, the same powers as those exercised by a receiver in equity to the extent consistent with this section, and, subject to the authorization and control of the judge, the power to operate the business of the debtor during such period, fixed or indefinite, as the judge may from time to time prescribe;"

"(o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect

to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved."

The corresponding provisions of Chapter X of the Bankruptcy Act (Sections 111, 113, 186, 187, 112, 114, 200) (11 U. S. C. A. 511, 513, 586, 587, 512, 514, 600) are as follows:

§ 511. ***Exclusive jurisdiction over debtor and property.*** Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located.

§ 513. ***Jurisdiction as in insolvency.*** Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature.

§ 586. ***Trustee; title.*** A trustee, upon his appointment and qualification, shall be vested with such title as a trustee appointed under section 72 of this title would have.

§ 587. ***Same; rights, powers, and duties.*** Where not inconsistent with the provisions of this chapter, a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 72 of this title, and, if authorized by the judge, shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed

by a court of the United States for the property of the debtor.

§ 512. *Matters prior to approval of petition; jurisdiction, powers and duties.* Prior to the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding before adjudication.

§ 514. *Matters upon approval of petition; jurisdiction, powers, and duties.* Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

§ 600. *Rights, duties, and liabilities of creditors, etc.* Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, before the approval of the petition, as in a bankruptcy proceeding before adjudication and, upon the approval of the petition, as in a bankruptcy proceeding upon adjudication.

Section 44 of the Bankruptcy Act (11 U. S. C. A. 72) reads as follows:

"(a) The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint

a trustee or if the trustee so appointed fails to qualify as herein provided, the court shall make the appointment. If the bankrupt is a face-amount certificate company, as defined in section 80a—4 of Title 15, the court alone shall make the appointment; but the court shall not make such appointment without first notifying the Securities and Exchange Commission and giving it an opportunity to be heard.

"(b) Such creditors may, at their first meeting, also appoint a committee of not less than three creditors, which committee may consult and advise with the trustee in connection with the administration of the estate, make recommendations to the trustee in the performance of his duties and submit to the court any question affecting the administration of the estate.

"(c) An attorney shall not be disqualified to act as attorney for a receiver or trustee merely by reason of his representation of a general creditor."

OCT 10 1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 392

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents fail to meet petitioner's argument as to the law.

They refer to an order of the St. Louis Southwestern reorganization court which forms no part of the record and which in no way affects the question submitted to this Court.

They contend, without justification, that the claim filed herein is without merit.

I.

As to respondents' discussion of the law:

Respondents in their Point I do not answer the point made by petitioner that in the ordinary bankruptcy or

equity receivership proceeding, if the trustee or receiver fails to take over or to enjoin the prosecution of a suit brought previous to bankruptcy or receivership, it may not be pleaded as a defense that the appointment of the trustee or receiver vested such title in him as to abate the suit.

They also fail to answer petitioner's point that there is nothing in Section 77 of the Bankruptcy Act which serves to differentiate the law in reorganization proceedings from the law in ordinary bankruptcy or equity receivership proceedings so as to preclude the continued prosecution of a suit begun or a claim filed previous to reorganization proceedings (Main Brief, p. 11, *et seq.*).

Respondents contend under their Point II that the decision of the Circuit Court of Appeals herein is not in conflict with applicable decisions of this Court.

They fail to discuss the cases cited by petitioner in his brief (pp. 13-17), including *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *Ex Parte Baldwin*, 291 U. S. [illegible]; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, and *Warren* v. *Palmer*, 310 U. S. 132, which show that in the opinion of this Court bankruptcy courts have always had exclusive jurisdiction of the bankrupt estate.

Respondents confine their discussion under this head to *Thatcher* v. *Rockwell*, 105 U. S. 467, and *Johnson* v. [illegible], 222 U. S. 538. These cases were cited by petitioner in support of the proposition that the appointment of the trustee in the ordinary liquidating bankruptcy does not abate a pending suit (Main Brief, p. 12).

If, however, it is true, as petitioner contends, that subsection (a) of Section 77 does not serve to differentiate the law in reorganization proceedings from the law in bankruptcy and receivership proceedings in such a way as to preclude the continued prosecution of the claim, then it may be claimed with reason that the decision of the

Circuit Court of Appeals is in conflict also with these decisions of this Court.

Respondents endeavor to distinguish *Thatcher* v. *Rockwell* on the ground that it was alleged in that case that the assignee in bankruptcy had no interest whatever in the suit because the claim had been transferred by the bankrupt to a third person more than four months previous to bankruptcy. In quoting from the decision of the Court (Respts' Brief, pp. 10-11), they fail to include the language that follows (pp. 469-470):

> The further charge of the court to the effect that if the assignee expressly consented that the bankrupt might continue to prosecute the suit in his own name, the defendants could not avail themselves of the bankruptcy as a defence, was also right. * * * The true rule is stated in *Foster* v. *Gaff*, 91 U. S. 521; *Burbank* v. *Bigelow*, 92 id. 179; *Norton* v. *Switzer*, 93 id. 355; *Jerome* v. *M'Carter*, 94 id. 734; *M'Henry* v. *La Société Française, &c.*, 95 id. 38; and *Dauchy* v. *Freedlander*, 104 id. 570. These cases, although the bankrupt happened to be a defendant, establish the doctrine that under the late bankrupt law the validity of a pending suit, or of the decree or judgment therein, was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not, he was equally bound with any other party acquiring an interest *pendente lite*. *It is no defence to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor.*[*]

Johnson v. *Collier*, 222 U. S. 538, has not the limited applicability claimed by the Circuit Court of Appeals (R. 63) and by the respondents (p. 11 of their brief). In that case the bankrupt brought suit after filing a voluntary

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[*] Italics petitioner's.

petition, but before the appointment of the trustee. The Court held that a suit begun *after* bankruptcy but before the appointment of a trustee may be continued after such appointment, in the absence of any action on the part of the trustee to enjoin the continued prosecution of the suit. Thus the *Collier* case is a reaffirmation and extension of the rule laid down in *Thatcher* v. *Rockwell*. After citing that case, Justice Lamar said (p. 540):

> "If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice."

At page 7 of their brief respondents state they are unable to perceive how subsection (*l*) of Section 77 affects the provisions of subsection (a) as contended.

The opinion of Judge Sanborn in *Thompson* v. *Terminal Shares*, 104 F. (2d) 1, at pp. 4-5, states that these provisions are to be read together (Main Brief, p. 17). See also *In re Prudence Bonds Corp.*, 75 F. (2d) 262; *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363; and *In re Standard Gas & Electric Co.*, 119 F. (2d) 658, where there was a similar construction of similar provisions of Section 77B.

Respondents refer (p. 7) to Section 57 (m) of the Bankruptcy Act (11 U. S. C. A. 93(m)), which states:

> "The claim of any estate which is being administered in bankruptcy against any like estate may be proved and filed by the receiver or trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors."

and contend that the privilege conferred upon the trustee or receiver is so exclusive as to abate a claim, as in the instant case, filed previous to reorganization proceedings of the company for whose benefit the claim was filed.

A trustee in bankruptcy or a receiver always has had the power to file a claim in another bankruptcy or receivership proceeding. But even if the language of the statute made it mandatory upon the receiver or trustee "to prove and file the claim", this, in view of the decisions of the courts cited in his main brief, would in no way affect petitioner's right to continue to prosecute a claim filed previous to reorganization proceedings.

Respondents cite subsection (c)(9) of Section 77 which requires the court to direct the trustee to report any facts pertaining to irregularities, fraud, misconduct or mismanagement as a consequence of which the debtor may have a cause of action.

This subsection, in addition to subsection (a) was relied upon by the Special Master in support of his findings and conclusions (R. 42). Neither the District Court nor the Circuit Court of Appeals, however, thought it worth while to refer to subsection (c)(9). A trustee or receiver would be under the duty imposed by this subsection even without this express provision. Moreover, the fact that the court is expressly so charged does not in itself carry the assurance of a thorough and impartial investigation if the trustee has not the capacity or the will to do so.

Under Point III respondents purport to answer petitioner's contentions:

(a) That the decision of the Circuit Court of Appeals herein is clearly in conflict with decisions of the Circuit Court of Appeals for the Second Circuit, and

(b) That the decision is probably in conflict with decisions of the Circuit Courts of Appeals for the Eighth, Ninth and Third Circuits.

As to (a):

Petitioner cited three cases under this head (Main Brief, pp. 19-21). *In re Prudence Co.*, 96 F. (2d) 157, clearly in point, is not discussed by respondents. *In re Prudence Bonds Corporation*, 75 F. (2d) 262, was cited by petitioner for the dictum quoted. The two *Prudence* cases should be read together.

Respondents fail to bring out that in the earlier case, the stay was granted by the *reorganization court* on the ground that the suit would interfere with the disposition of the debtor's estate. The language quoted by the respondents from the opinion in that case would indicate that, in the view of Judge Hand, the bankruptcy court previous to the enactment of Section 77B had the jurisdiction which was expressly conferred by subsection (a) of that statute. Admitting that the trustee of St. Louis Southwestern may apply to stay the prosecution of the claim herein, the fact is that he has not done so.

Petitioner, in addition, cited *Meyer* v. *Kansas City Southern*, 84 F. (2d) 411, decided by the same court, which is also not discussed by respondents.

As to (b):

Respondents in their brief (pp. 11, 13) wrongly interpret two of the three cases cited by petitioner in support of his position, viz., *Thompson* v. *Terminal Shares*, 104 F. (2d) 1, and *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363. They omit any mention of the third case, *In re Standard Gas & Electric Co.*, 119 F. (2d) 658.

Judge Sanborn in *Thompson* v. *Terminal Shares* held that the jurisdiction conferred by Section 77 was to be considered the "traditional jurisdiction" of the bankruptcy court.

In *United States* v. *Tacoma Oriental S. S. Co.*, it was held that "exclusive jurisdiction" under Section 77B was given to the court "only if such person is in some manner invading, interfering, or disposing of the debtor's res, and then only to the extent of preventing or forestalling the invasion, interference or disposition of such res. The act gives no jurisdiction to the trial court to issue its process outside its district in proceedings purely in personam, in which no protection of the debtor's res is involved."

In *In re Standard Gas & Electric Co.*, 119 F. (2d) 658, at page 661, the Court said:

> "The grant of exclusive jurisdiction over the debtor and its property was not a departure from established bankruptcy practice. The Bankruptcy Act, 11 U. S. C. A. § 1, et seq., from the time of its enactment had conferred upon courts of bankruptcy exclusive jurisdiction over bankrupts and their property. Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645; Lazarus, etc. v. Prentice, 234 U. S. 263, 34 S. Ct. 851, 58 L. Ed. 1305; Forcey v. Silberblatt, 3 Cir., 78 F. 2d 1016. * * * In section 77B Congress likewise did not by any express language confer broad jurisdiction over claims by a debtor or its trustee against third persons. We think that such jurisdiction is not to be implied from the grant of jurisdiction over the debtor's property, but that the latter jurisdiction is essentially similar in nature to that possessed by courts of bankruptcy over the property of bankrupts."

The decision of the Circuit Court of Appeals herein is in conflict with the above decisions.

Respondents discuss at pages 12 to 14 of their brief a number of decisions in ordinary liquidating bankruptcy

and receivership cases cited by petitioner. These decisions, not being in reorganization cases, were not cited in support of petitioner's position that the decision herein was in conflict with the decisions of other Circuit Courts of Appeals. Nevertheless, if Section 77, as shown by petitioner, conferred no such jurisdiction on the reorganization court as would preclude the prosecution of the claim by petitioner, the decision herein may be said to be in conflict with said decisions.

A discussion of the cases referred to by respondents follows:

In *Paradise* v. *Vogtlandische Maschinen-Fabrik*, 99 F. (2d) 53, after a suit had been brought, the plaintiff was adjudicated a bankrupt and a trustee was appointed. The plaintiff continued the prosecution of the suit. The Court held (p. 55):

> "It is settled that a pending action will not abate merely because of the bankruptcy of the plaintiff. Thatcher v. Rockwell, 105 U. S. 467, 26 L. Ed. 949; Hahlo v. Cole, 112 App. Div. 636, 98 N. Y. S. 1049; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 46 S. E. 870. * * * If the trustees decline or fail to prosecute the action the bankrupt may continue its prosecution to judgment. Bluegrass Canning Co. v. Steward, 6 Cir., 175 F. 537; Griffin v. Mutual Life Ins. Co., supra; Hahlo v. Cole, supra; Bennett v. Associated Theaters Corp., 247 Mich. 493, 226 N. W. 239."

In *Bluegrass Canning Co.* v. *Steward*, 175 Fed. 537, suit was begun by a corporation previous to bankruptcy. The Court said (pp. 543-544):

> "Pending the suit below the canning company was adjudicated a bankrupt, and this fact was shown in the case. The creditors declined to prosecute the suit. The court below allowed the suit to go on in the name of the bankrupt upon the execution of a bond indemnifying the bankrupt against costs by J. E. Gunther, a surety upon the attachment bond, * * *

and the motion to dismiss the suit because of the plaintiff's bankruptcy was denied. * * * The bankruptcy of the corporation did not dissolve it. 2 Clark & Marshall, Private Corporations, p. 863. While the bankrupt trustee may intervene and prosecute a pending suit if he will, yet, if he does not, we see no reason why the bankrupt may not go on with it if he wishes. Loveland on Bankruptcy (3d Ed.) p. 428."

Missouri, K. & T. Trust Co. v. *German Nat. Bank*, 77 Fed. 117, was a suit by a bank which subsequently became insolvent. A motion was made by the defendant to have the receiver of the bank substituted as plaintiff. The Court said (pp. 122-123):

"This motion was denied, and an exception was taken by counsel for the trust company. * * * the denial of the motion is no ground for a reversal of the judgment which was subsequently rendered. The denial of the motion did not prejudice the rights of the trust company in any respect, and if the receiver desires to be substituted as a party plaintiff, so as to be in a position to control the judgment, on making a proper application to the circuit court he can still be made a party for the purpose above indicated."

In *Boston Elevated Ry. Co.* v. *Paul Boyton Co.*, 211 Fed. 812, the defendant pleaded that after the suit had been begun a receiver was appointed for the plaintiff and that the plaintiff was without right to continue to prosecute the suit without leave of court. The Court held (p. 823):

"The suit did not abate by the appointment of a receiver for the plaintiff's rights of action while it was pending. The receiver had not asked to intervene, nor had the defendant moved to have him substituted as plaintiff. The question of his right to maintain the action, as receiver, in the jurisdiction of a court other than that of his appointment did not arise."

In *Hartford Accident & Indemnity Co. v. Federal Bond & Mtge. Co.*, 59 F. (2d) 950, defendant moved to abate the action in case the receiver did not intervene. The motion was denied.

The opinions in the cases cited by petitioner in support of the rule, and not discussed by respondents, are at least as equally convincing.

II

As to the order of the St. Louis Southwestern reorganization court referred to by respondents:

At page 8 of their brief respondents refer to an order of Judge Moore of the St. Louis Southwestern reorganization court, denying an application for an order to show cause why an order should not be made and entered permitting petitioner to prosecute the claim filed by him in behalf of St. Louis Southwestern against the Rock Island. The order forms no part of the printed record. Respondents state that a copy of the order, under certificate, has been filed by them with the Supreme Court. They also state that the application for the order to show cause "was filed after the entry on February 7, 1944 of the order of the District Court in the Rock Island proceedings disallowing the claim," and that after the appeal was perfected they "filed their motion in the Circuit Court of Appeals asking leave to supplement the record by making Judge Moore's order a part thereof; the Circuit Court of Appeals did not pass on this motion."

Respondents add:

> "Nowhere in his petition or brief does he [petitioner] mention Judge Moore's order denying him permission to prosecute his claim."

Respondents on February 8, 1945, made motions to dismiss the appeal and for leave to supplement the record.

On February 15, 1945, an order was entered denying the motion to dismiss, with leave to renew.

The respondents in their brief of April 5, 1945, submitted to the Circuit Court of Appeals, renewed their motions, but there was no further order by the Court thereon.

Respondents could have had the papers on these motions, together with said order of Judge Moore annexed thereto, included in the record on the petition. They failed to have this done.

Petitioner does not regard these moving papers as important or relevant to the question presented to this Court. Inasmuch, however, as respondents have referred to these moving papers and apparently attach great importance to the said order, petitioner reproduces in the appendix to this brief: (1) Respondents' motion herein to dismiss the appeal and motion for leave to supplement the record, (2) the order denying the motion to dismiss the appeal with leave to renew; (3) petitioner's answer to said motions. A certified copy of these papers is being filed with this Court.

Judge Kerner of the Circuit Court of Appeals in his opinion herein made no mention of the order of Judge Moore, though this order had previously been called to the attention of the Court by respondents' motion to have it made part of the record on the appeal. Because of this and because the order formed no part of the record, petitioner did not refer to it in his petition or brief.

The order in question, as shown on its face, is an order denying an application for an order to show cause. The purpose of an order to show cause, it is unnecessary to state, is to shorten the time in which a motion under the rules must be made returnable. A denial of an application for such an order is not a denial of the motion which it is sought to bring on in this way.

As appears from said answer, petitioner in New York was informed over the telephone by his local counsel in St. Louis that upon the argument of the order to show cause the point was raised by the trustee of St. Louis Southwestern that the petitioner had unduly delayed making his application. This apparently was the reason for the denial of the application for the order to show cause.

But even assuming that there had been a motion duly noticed and a decision had been rendered on the merits (which was not the case), such a denial would not have constituted a stay and would not affect the question presented to this Court.

The fact that the claim against Rock Island has been formally called to the attention of the St. Louis Southwestern trustee by the application for the order to show cause would indicate this at least, however,—that the trustee had given consideration to the cause of action set forth in the claim and had deliberately chosen neither to take over the claim, nor, on the other hand, to take steps to restrain its continued prosecution by petitioner.

III

As to the substantial and meritorious nature of the claim:

Under Point IV respondents state (p. 18) that the claim filed by petitioner in behalf of St. Louis Southwestern "has no possible asset value to" St. Louis Southwestern, and that "respondents should not be put to the time, trouble and expense of a hearing involving a subject which has already been so thoroughly threshed out."

Petitioner did not "inject" into the discussion the merits of the claim. The matter is referred to by the Circuit Court of Appeals (R. 62), and at great length by the Special Master (R. 34-36, 46-47) although it was not

intended that he go into the merits of the claim in deciding the question submitted to him (R. 34).

The report of the Interstate Commerce Commission in the St. Louis Southwestern reorganization proceedings shows that petitioner charged breaches of fiduciary and contractual obligations and violations of the antitrust laws in connection with the control exercised over St. Louis Southwestern by Rock Island, Kansas City Southern, and Southern Pacific Company, and that as a result the earnings of St. Louis Southwestern were impaired and its assets wasted. The Commission found that petitioner's charges were not sustained. (See *St. Louis Southwestern Ry. Co. Reorganization*, 249 I. C. C. 5, at pp. 46-149; 252 I. C. C. 325, at pp. 330-338.) As Chairman Eastman stated in his dissenting opinion, however, the Commission made no investigation (p. 186; R. 26).

In the decision of the United States District Court affirming the report of the Interstate Commerce Commission, *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914, referred to by the respondents (p. 16), the Court held, at page 927, that "the validity of Meyer's charges of bad faith" was a matter "requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements, freight loadings, financial statements, and other data peculiarly within the comprehension of the I. C. C. We are of the opinion that the Commission has had full opportunity to pass on these matters and exercise informed judgment. We are, therefore, not disposed to refer the plan back to the Commission on this account and, accordingly, overrule Meyer's objections to the plan of reorganization."

Petitioner asserts in his appeal from the decision of said District Court that the report of the Commission is of a highly arbitrary nature and is contrary to the proof in the record, and that Judge Moore of the St. Louis Southwestern reorganization court gravely erred in failing to

evaluate either the proof placed in the record before the Commission or the large amount of additional proof placed in the record in the hearings before Judge Davis.* Indeed the important proof placed in the record in the hearings before Judge Davis has thus not been considered either by the Interstate Commerce Commission or by the District Court.

The respondents in their brief (pp. 17-18) quote certain paragraphs from Chairman Eastman's dissenting opinion (R. 26), in which Mr. Eastman refers to the conjuring up by petitioner of "conspiracies which go beyond the reasonable probabilities of the situation." They state that in view of this language, it is misleading for petitioner to state that Chairman Eastman dissented upon the matters now under consideration.

That remark of Chairman Eastman does not refer to the matters so vividly set forth by him in his dissenting opinion, which indicate that he believed that Rock Island had played a leading role in the downfall of St. Louis Southwestern (R. 17, *et seq.*).

Chairman Eastman, it is clear from his opinion, read together with the majority report of the Commission (249 I. C. C. 5, at p. 49), was alluding to the petitioner's charge that Union Pacific continued in control of Southern Pacific long after the decree of the Supreme Court in *United States* v. *Union Pacific*, 226 U. S. 61, dissolving the illegal combination by which Union Pacific controlled Southern Pacific, and that acting under the influence of interests close to Union Pacific, Southern Pacific instigated the filing of the petition for reorganization of St. Louis Southwestern.

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* Extended hearings were held before Judge Davis in October and November 1942. Before any decision was rendered, Judge Davis passed away, and Judge Moore succeeded him in the case.

It was not alleged by petitioner in the claim herein that Rock Island was in league with Union Pacific. Therefore, whether petitioner was justified in the charge in question is quite beside the issue involved in this case.

As to the reference to *diversions of traffic* in respondents' quotation from the dissenting opinion, Chairman Eastman admitted that he "has not been able to study it with the greatest of care."

The suit instituted by the Government on August 23, 1944, against forty-seven Class I railroads owning lines west of the Mississippi, two important banking houses and others, charged a conspiracy of a far-reaching nature, as appears from the Government's complaint in that suit together with the "Western Agreement," annexed as an exhibit. Union Pacific, Southern Pacific, Kansas City Southern, Missouri-Kansas-Texas, the trustees of Rock Island and the St. Louis Southwestern trustee are joined as defendants. The violations of the Sherman Antitrust Act charged are alleged to have continued at least up to the time of the filing of the complaint. These violations include not only a conspiracy to keep up rates, but also nineteen other offenses. The Rock Island and the St. Louis Southwestern and their respective trustees, petitioner avers, were involved in these violations. The failure of Southern Pacific to carry out its contractual obligations to St. Louis Southwestern and to take various other steps in the development of St. Louis Southwestern, petitioner is convinced, resulted in part from the illegal combination charged.

The Government's suit is referred to in petitioner's answer to respondents' motions to dismiss the appeal and to supplement the record, reproduced in the appendix hereto.

Petitioner regarded the facts revealed by the Government's suit as constituting newly discovered evidence of the utmost importance and relevancy to his charges of conspiracy by which St. Louis Southwestern was con-

trolled, its assets wasted and its earnings impaired. He therefore moved before the Circuit Court of Appeals for the Eighth Circuit in December, 1944, that the St. Louis Southwestern proceedings be remanded to the District Court with instructions to remand to the Interstate Commerce Commission in order that the Commission might decide whether to institute an investigation into the facts alleged by the Government in its said suit.

On the argument, the Court ruled that the motion be set aside without prejudice and be heard in connection with the hearing upon the merits of the appeals. The appeals together with said motion were argued on April 6 and 7, 1945, and are now being considered by the said Circuit Court of Appeals.

CONCLUSION

For the reasons urged therein, the petition for a writ of certiorari should be granted.

Dated: New York, October 5, 1945.

Respectfully submitted,

WALTER E. MEYER,
Petitioner *Pro Se.*

SONNENSCHEIN, BERKSON, LAUTMANN,
LEVINSON & MORSE,
Attorneys for Petitioner.

Appendix

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8585

IN THE MATTER OF

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor,

WALTER E. MEYER,

Appellant,

v.

JOSEPH B. FLEMING and AARON COLNON, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable MICHAEL L. IGOE, Judge.

MOTION TO DISMISS APPEAL. MOTION FOR LEAVE TO SUPPLEMENT RECORD.

Joseph B. Fleming and Aaron Colnon, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, appellees herein, move:

1. That this appeal be dismissed on the ground that the appellant Walter E. Meyer, claimant below, has no right to prosecute the cause of action set forth in his claim;

2. That they be granted leave to supplement the record herein by filing in this court a certified copy of an order of the United States District Court for the Eastern District of Missouri, entered February 28, 1944, in the reorganization proceedings of St. Louis Southwestern Railway Company, No. 8497, denying said Walter E. Meyer's application for permission to prosecute, on behalf of St. Louis Southwestern Railway Company, the claim theretofore filed by him in the court below.

Respectfully submitted,

JOSEPH B. FLEMING,
AARON COLNON,
Trustees, Appellees,
By OTIS F. GLENN,
W. F. PETER,
MARCUS L. BELL,
Attorneys for Appellees.

Appendix.

STATEMENT.

This is an appeal from an order disallowing a claim filed by appellant in the reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company.

In accordance with the prescribed procedure appellant filed with the Special Master in the proceedings below a "proof of claim" of St. Louis Southwestern Railway Company and of himself and other minority stockholders of said company against The Chicago, Rock Island and Pacific Railway Company, claiming $31,593,874 damage to the St. Louis Southwestern Railway Company, a Missouri corporation, as a result of a conspiracy, set out in the proof of claim (R. 2), between The Chicago, Rock Island and Pacific Railway Company, principal debtor in the proceedings below, and certain other parties, to injure and damage the St. Louis Southwestern to their own advantage. It is apparent from the face of the claim that it is a derivative stockholders' claim.

The claim was filed April 26, 1934.

On December 12, 1935, St. Louis Southwestern Railway Company filed in the District Court of the United States for the Eastern District of Missouri a petition for reorganization under Section 77 of the Bankruptcy Act (R. 8). On January 3, 1936, the court held that the petition was properly filed, and on January 4, 1936, appointed Berryman Henwood, Esq., trustee under Section 77.

The Trustees herein had already filed objections to the claim (R. 7), but promptly upon the appointment of a trustee for the St. Louis Southwestern Railway Company filed with the Special Master a statement of that fact, alleging that the effect of the bankruptcy proceedings of

the St. Louis Southwestern was to vest in the Trustee all causes of action vested in or belonging to the St. Louis Southwestern Railway Company, and that by reason thereof the claimant Meyer, appellant here, could no longer maintain or assert his claim in this proceeding (R. 8).

On February 2, 1942, Jacob I. Grossman, Special Master, filed with the Clerk's office his Master's report on said claim (R. 34). He held (R. 36):

> "In my opinion Meyer should not be allowed to prosecute this claim:
>
> "(1) The prosecution of claims on behalf of St. Louis Southwestern Railway Company or its trustee is in the exclusive jurisdiction and authority of the United States District Court for the Eastern District of Missouri, in which there is pending the St. Louis Southwestern reorganization case under Section 77 of the Bankruptcy Act. That court has not authorized Meyer to prosecute the claim, nor has that court or its trustee adopted the claim.
>
> "(2) The reason for the prosecution by a stockholder of a claim belonging to a corporation ceases when a trustee for the corporation is appointed in reorganization proceedings under Section 77 of the Bankruptcy Act.
>
> "(3) Neither the corporation nor its trustee in the reorganization proceedings has been brought into the jurisdiction of this court by summons."

This report was accompanied by a supplemental report which considered certain suggestions made by Meyer as to the form of the first report mentioned, which had been submitted to Meyer for his comment.

On February 7, 1944, the court below approved the Master's report, and entered an order disallowing the

claim. The Court made the following finding (R. 51):

> "THE COURT FURTHER FINDS that on the 12th day of December, 1935, the St. Louis Southwestern Railway Company filed its petition for reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the Eastern District of Missouri. Subsection (a) of Section 77 (11 U. S. C. A. Sec. 205 (a)) provides in part as follows:
>
> "'If the petition is so approved, the Court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.'"

After quoting from subsection (c) (2) of Section 77, the Court further said (R. 52):

> "Under the foregoing provisions of the Bankruptcy Act, upon approval of a petition for reorganization and the appointment of a trustee or trustees, all rights of action on behalf of the debtor are vested in the trustee or trustees, subject to the control of the Bankruptcy Court. While a debtor's property is being administered upon in a Bankruptcy Court, it would be inconsistent to have rights of action in favor of the debtor enforcible by its stockholders at their own will and discretion. If a trustee should refuse or fail to act, the stockholders may request the Court to issue appropriate instructions to the trustee. The record here does not show that claimant ever requested such action or obtained permission from the District Court for the Eastern District of Missouri to prosecute this claim."

The law is clear: there is no possibility of a different construction. The prosecution of this claim is entirely in the hands of the St. Louis Southwestern Trustee, under the instructions of the court which appointed him. That Trustee is a stranger to these proceedings; since his appointment, appellant Meyer is a stranger to this claim. This appeal therefore should be dismissed.

While it has no legal bearing on the order of the Court below from which this appeal is pending, it is proper in order to acquaint this Court with all the facts in the matter, that the appellees ask leave, which they hereby do, to submit to this Court a certified copy of an order of the United States District Court for the Eastern District of Missouri, entered February 28, 1944 (after the entry of Judge Igoe's order below), in the reorganization proceedings of St. Louis Southwestern Railway Company therein pending (In the Matter of St. Louis Southwestern Railway Company, Debtor, No. 8497, U. S. Dis. Ct. E. D. Missouri, Order No. 779, Printed Proceedings page 8997). A certified copy of said order is attached to this motion. From this order it appears that the court in the St. Louis Southwestern proceedings has refused to permit Meyer, appellant, to prosecute the claim.

Respectfully submitted,

OTIS F. GLENN,
W. F. PETER,
MARCUS L. BELL,
Attorneys for Joseph B. Fleming and Aaron Colnon, Trustees, Appellees.

Chicago, Illinois,
February 8, 1945.

Appendix.

IN THE

DISTRICT COURT OF THE UNITED STATES

EASTERN DIVISION,

EASTERN JUDICIAL DISTRICT OF MISSOURI.

IN THE MATTER OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor.	No. 8497.

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD.

ORDER

DENYING ORAL MOTION OF WALTER E. MEYER FOR AN ORDER ON BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR, TO SHOW CAUSE WHY AN ORDER SHOULD NOT BE MADE PERMITTING WALTER E. MEYER TO PROSECUTE A CLAIM FILED BY HIM IN BEHALF OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AGAINST THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DSTRICT OF ILLINOIS, EASTERN DIVISION, IN THE PROCEEDINGS ENTITLED "IN THE MATTER OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, DEBTOR; IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD, NO. 53209."

Oral motion of Walter E. Meyer for an order on Berryman Henwood, Trustee of the property of the Debtor St. Louis Southwestern Railway Company, to show cause why an order should not be made and en-

tered permitting said Walter E. Meyer to prosecute the claim filed by him in behalf of St. Louis Southwestern Railway Company on or about April 24, 1934, against the Chicago, Rock Island and Pacific Railway Company, in the District Court of the United States for the Northern District of Illinois, Eastern Division, in the proceedings entitled "In the Matter of The Chicago, Rock Island and Pacific Railway Company, Debtor; In Proceedings for the Reorganization of a Railroad, No. 53209", being presented to the Court with affidavits in support thereof, and the Court having heard counsel on the said motion, and being fully advised in the premises,

It Is Ordered:

That the said motion of Walter E. Meyer be and the same is hereby denied by the Court.

(signed) GEO. H. MOORE,
District Judge.

Dated February 28, 1944.

(Certification by Clerk)

Appendix.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8585

February 15, 1945

IN THE MATTER OF CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., Debtor, WALTER C. MEYER, Appellant, *v.* JOSEPH B. FLEMING & AARON COLNON, as Trustees, etc., Appellees.	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Before Honorable WILLIAM M. SPARKS, Circuit Judge.

It is ordered that the motion of appellees to dismiss this appeal be denied, without prejudice to the right to renew said motion at the hearing.

It is further ordered that appellant's brief herein be filed on or before March 16, 1945.

Appendix.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8585

IN THE MATTER OF
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor.

WALTER E. MEYER,
Appellant,
v.
JOSEPH B. FLEMING and AARON COLNON, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable MICHAEL L. IGOE, Judge.

ANSWER OF APPELLANT TO MOTIONS OF APPELLEES TO DISMISS APPEAL AND FOR LEAVE TO SUPPLEMENT RECORD

The Trustees, appellees herein, made motions dated February 8, 1945, to dismiss the appeal herein and for leave to supplement the record. After hearing, this Court denied the motion to dismiss without prejudice to renew at the hearing upon the appeal. The appellees in the concluding paragraph (p. 12) of their brief, dated April 5, 1945, state that they are renewing the said motions.

At pages 3 to 5 of the said motion papers there is a discussion of matters bearing on the contested issues of this appeal. These matters are covered in appellant's brief and reply brief submitted to this Court.

Appellees annexed to their motion papers a copy of an order of the St. Louis Southwestern reorganization court, dated February 28, 1944, from which it appears that that court denied an application for an order to show cause why an order should not be made permitting this appellant to prosecute the claim filed by him herein in behalf of St. Louis Southwestern.

Appellees admit (p. 6) that the order "has no legal bearing on the order of the Court below from which this appeal is pending." They state, however: "From this order it appears that the court in the St. Louis Southwestern proceedings has refused to permit Meyer, appellant, to prosecute the claim."

As appears from the order itself, this is not in accordance with the facts.

This appellant was not present upon the argument of the said application. He did, however, draw the affidavit upon which the application was based.

It was stated in said affidavit that some nineteen days previous thereto, the United States District Court for the Northern District of Illinois, Eastern Division (through Judge Igoe), had rendered its decision holding that appellant had no right to prosecute the cause of action set forth in the claim filed herein.

Appellant in said affidavit referred to the following language in the order of Judge Igoe, and also annexed a copy of said order:

> "While a debtor's property is being administered upon in a Bankruptcy Court, it would be inconsistent

to have rights of action in favor of the debtor enforcible by its stockholders at their own will and discretion. If a trustee should refuse or fail to act, the stockholders may request the Court to issue appropriate instructions to the trustee. The record here does not show that claimant ever requested such action or obtained permission from the District Court for the Eastern District of Missouri to prosecute this claim" (Tr. 52).

The special reasons for asking for an order to show cause were stated by appellant to be as follows:

"My time to appeal and to file an application for a rehearing upon the decision and order of Judge Igoe expires on March 7, 1944. Unless this application is granted in time for me to present the above authorization to the United States District Court of Illinois and to take appropriate steps for a rehearing upon Judge Igoe's order, I will be precluded from obtaining the relief which I intend to seek in said United States District Court of Illinois.

"For this reason I make this application by order to show cause rather than by ordinary notice of motion."

It does not appear why the application for the order to show cause was denied. As appears from an entry in appellant's diary contemporaneously made, however, appellant was informed over the telephone by his local counsel that the point was raised by the trustee of St. Louis Southwestern that this appellant had unduly delayed making the application.

The only definite fact revealed by the order, copy of which is annexed to appellees' motions, is that the trustee of St. Louis Southwestern has knowledge of the existence of the claim and that having that knowledge, he has chosen not to take any steps to enjoin its continued prosecution. The fact that a trustee in bankruptcy has knowledge of

the existence of a cause of action which is being asserted by a bankrupt and takes no steps to restrain its continued prosecution, is a consideration of weight in determining whether a court will permit the continued prosecution of a suit. See the language quoted from *Paradise* v. *Vogtlandische Maschinen-Fabrik*, 99 F. (2d) 53, 55, in appellant's reply brief (p. 5).

The effect of the denial on February 28, 1944, of the application for the order to show cause was to prevent appellant from using such an order upon a motion for a rehearing before Judge Igoe, as the time to file an application for a rehearing expired on March 7, 1944.

Thereafter appellant did not make a formal motion to the Missouri District Court for authorization to continue to prosecute the claim herein because he had concluded, after a further examination of the law, that there was no necessity for obtaining such express authorization. While it always had been appellant's position that this was the law, appellant felt strengthened in the position that he had taken upon reading *Thompson* v. *Terminal Shares*, 104 F. (2d) 1, construing subsection (a) of Section 77, and other cases construing similar language of Section 77B of the Bankruptcy Act (see appellant's main brief, p. 12 et seq.). These cases show that there was little or no enlargement of the jurisdiction of the reorganization court by reason of the language of the statute relied on by the Special Master and the Court below, and certainly no such enlargement of jurisdiction or such change in any other respect as to preclude this claimant from continuing to prosecute the claim herein. These cases had not been called to the attention of the Special Master and the Court, and were not known to appellant at the time he submitted his application for an order to show cause to the St. Louis Southwestern reorganization court.

The appellees apparently have not been eager to have a trial upon the merits of the cause of action set forth in the claim filed herein.

The claim was filed by appellant on April 26, 1934 (Tr. 2). On May 25, 1935, objections were filed by the appellees (Tr. 7). On January 16, 1936, the appellees, by additional objections, raised the point that the effect of the appointment of a trustee of St. Louis Southwestern was to vest in such trustee all causes of action belonging to the St. Louis Southwestern, and that by reason thereof appellant could no longer maintain or assert his claim in the Rock Island reorganization proceedings (Tr. 8).

On June 5, 1941, *over five years thereafter*, appellant received a notice setting the claim down for a hearing on the merits on June 23, 1941.

Shortly thereafter it was proposed that the preliminary question of appellant's right to prosecute the claim should be passed upon by the Special Master. This has been the occasion of additional delay.

During the year 1944 and for the first few months of this year, appellant has been under the heavy burden of preparing his designations of the voluminous record and his briefs on the appeal to the Circuit Court of Appeals in the St. Louis Southwestern reorganization proceedings.

On January 29, 1945, it was stipulated by the appellees to extend the time of this appellant to file his brief on appeal herein from February 15 to April 16, 1945. However, on February 8, 1945, some ten days thereafter, appellees filed their motions to dismiss the appeal and for leave to supplement the record. On February 15, 1945, this Court dismissed the motion to dismiss the appeal but without prejudice to renew said motion at the hearing upon the appeal.

There is an inconsistency in extending for a period of over two months the time to file a brief and within ten days after granting such extension moving to dismiss the appeal.

Facts outside the record are ordinarily not referred to on an appeal. There are a number of facts, however, to which the appellees, in carrying out their purpose "to acquaint this Court with all the facts" (see their motions, p. 6), have not called the attention of this Court.

The question of whether the claim herein is meritorious was not before the Special Master. The sole question presented to him was whether this appellant had the right to continue to prosecute the claim (Tr. 34, 50). Appellees have nevertheless endeavored to show by every means that the claim is without merit.

In support of his claim appellant in his reply to the objections of the appellees, referred to the dissenting opinion of the Chairman of the Interstate Commerce Commission in the St. Louis Southwestern reorganization proceedings (Tr. 12, 15-33); to the proposed report of C. V. Burnside, Assistant Director of the Bureau of Finance of the Commission, on the application of Rock Island to acquire stock control of St. Louis Southwestern, and to the fact that appellant had a very considerable amount of documentary and statistical evidence in his possession bearing on the merits of the claim (Tr. 13).

Appellant sets forth the following additional facts:

1. In connection with his appeal from the decision of the District Court approving a plan of reorganization of the St. Louis Southwestern, appellant alleges that the claim of Southern Pacific Company, a creditor in the amount of over $23,000,000 and owner of 87% of the stock of St. Louis Southwestern, for the reason, among others, that Southern Pacific, in control of St. Louis Southwestern,

failed to enforce causes of action which St. Louis Southwestern had against *Chicago, Rock Island & Pacific*, Kansas City Southern and others, in a plan of reorganization of St. Louis Southwestern should be subordinated to the interest of all other security holders and creditors of St. Louis Southwestern.

2. On or about February 15, 1945, the United States filed a brief *amicus curiae* with the Circuit Court of Appeals in the St. Louis Southwestern appeal, contending that St. Louis Southwestern had a cause of action against the Kansas City Southern which Southern Pacific in control of St. Louis Southwestern should have permitted that company to assert; that Southern Pacific's failure to permit St. Louis Southwestern to do so was a breach of trust for which its claim as a stockholder and creditor should be subordinated in the plan of reorganization of St. Louis Southwestern. The Government in its brief expressly took issue with the Interstate Commerce Commission and the trustee of St. Louis Southwestern in their conclusion that St. Louis Southwestern "had no cause of action against the Kansas City Southern." If the position taken by the Commission is to be considered by this Court, the position taken by the Department of Justice is entitled to at least equal weight.

3. On August 23, 1944, the United States, charging a conspiracy under Sections 1 and 2 of the Sherman Anti-trust Act, instituted suit in the District Court of the United States for the District of Nebraska, Lincoln Division, against numerous railroads owning lines west of the Mississippi, J. P. Morgan & Company, Incorporated, Kuhn, Loeb & Company and others. Among the railroads or their respective trustees joined as defendants in the suit are the trustees of Chicago, Rock Island and Pacific Railway Company, the trustee of St. Louis Southwestern Railway Company, the Kansas City Southern Railway Com-

pany, and Southern Pacific Company. Particulars of the illegal conspiracy and agreement in violation of the Sherman Antitrust Act are set forth in the complaint, twenty separate and distinct violations being charged.

Appellant in his proof of claim filed in these proceedings charges a continuing conspiracy, far-reaching in scope and protracted in time, in violation of the antitrust laws, by which St. Louis Southwestern was controlled to its damage, and finally wrecked. The Government in its complaint charges a continuing conspiracy, even more far-reaching and protracted, in violation of the antitrust laws.

The facts revealed by the allegations of the said complaint and the exhibit annexed thereto not only support appellant's charges but show increased opportunities for mischief to St. Louis Southwestern for a period of many years preceding the filing of the claim herein. Appellant regarded the said facts as constituting newly discovered evidence of the utmost importance and relevancy to his charges of conspiracy by which St. Louis Southwestern was controlled, its assets wasted and its earnings impaired. He therefore moved before the Circuit Court of Appeals that the St. Louis Southwestern proceedings be remanded to the District Court with instructions to remand to the Interstate Commerce Commission in order that the Commission might decide whether to institute an investigation into the facts alleged by the Government in its said suit.

Said motion and the appeal were argued on April 6th and 7th and are now being considered by the Circuit Court.

The claim herein includes not only the cause of action arising out of the participation by Rock Island in the conspiracy by which the earnings of St. Louis Southwestern were impaired during the period of control by Kansas City Southern and Southern Pacific. It also includes a cause of action for the control exercised by Rock Island over

St. Louis Southwestern for the period from March 11, 1925, to October 15, 1925, as a result of which the earnings of St. Louis Southwestern were impaired to the extent of $1,341,928 (Tr. 5). That Rock Island exercised control over St. Louis Southwestern during said period will not be disputed.

In said claim it is asked, in addition, that Rock Island account for its profits in the amount of $2,467,000 arising out of its sale to Kansas City Southern of its dominant stock interest in St. Louis Southwestern. The said sale is alleged to have been in breach of the fiduciary relationship Rock Island was in to St. Louis Southwestern and in violation of the antitrust laws (Tr. 6). A seller of a controlling stock interest in a corporation is under a duty not to transfer control to outsiders if circumstances surrounding the proposed transfer are of a suspicious nature. (See *Insuranshares Corporation* v. *Northern Fiscal Corp.*, 35 F. Supp. 22.)

Appellant asks that the motion to dismiss the appeal be denied.

Appellant also asks that the motion for leave to supplement the record be denied. If, however, the Court decides to grant said motion, appellant asks that this answer be included in the record.

Dated: May 3, 1945.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 392

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

BRIEF FOR PETITIONER

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IN THE

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JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

BRIEF FOR PETITIONER

The Opinions of the Courts Below

The opinion of the Circuit Court of Appeals (R. 61-65) is reported in 149 F. (2d) 529.

The opinion of the District Court (R. 49-52) is not reported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code [28 U. S. C. A. 347 (a)], as amended.

The judgment of the Circuit Court of Appeals was entered on June 6, 1945 (R. 66).

The petition for a writ of certiorari was filed on August 31, 1945, and certiorari was granted on October 22, 1945.

Statute Involved

The statute involved is Section 77 of the Bankruptcy Act, and particularly subsections (a), (c)(2) and (*l*) thereof [11 U. S. C. A. 205 (a), (c)(2) and (*l*)]. The pertinent language of said subsections is printed in the Appendix, pages 38-39 hereof.

Statement of the Case

Your petitioner, a stockholder and at the time a director of St. Louis Southwestern Railway Company (hereinafter referred to as "St. Louis Southwestern"), on April 26, 1934, filed a claim for the benefit of St. Louis Southwestern in proceedings under Section 77 of the Bankruptcy Act for the reorganization of The Chicago, Rock Island & Pacific Railway Company (hereinafter referred to as "Rock Island" or "debtor") instituted in the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 2).

The claim is in the amount of $31,593,874, $29,126,874 being for damages arising out of successive conspiracies in which Rock Island was alleged to have participated, by which St. Louis Southwestern was controlled from March 11, 1925, to June 7, 1933, the date of the initiation of the Rock Island reorganization proceedings, in breach of the fiduciary relationship those in control were in to St. Louis Southwestern and in violation of the antitrust laws. Rock Island is also asked to account to St. Louis Southwestern for profits in the amount of $2,467,000 realized in its purchase of a dominant stock interest in St. Louis Southwest-

ern in violation of the Clayton Act and the subsequent sale of such interest to Kansas City Southern, by which Kansas City Southern was caused to violate the Clayton Act (R. 2-7).

The claim was filed by petitioner in behalf of St. Louis Southwestern because at that time Southern Pacific Company controlled St. Louis Southwestern, and Southern Pacific Company and the directors of St. Louis Southwestern were co-conspirators with Rock Island in connection with the conspiracies by which St. Louis Southwestern was damaged (R. 3).

The trustees of Rock Island, respondents herein, on May 25, 1935, filed objections in the nature of a general denial of the said claim (R. 7).

On December 12, 1935, a year and a half after the filing of the claim, St. Louis Southwestern filed a petition for reorganization, under Section 77 of the Bankruptcy Act, in the United States District Court for the Eastern Judicial District of Missouri, Eastern Division. The Court approved the petition, and on January 3, 1936, appointed a trustee for the company (R. 51).

Among the objections filed thereafter by the respondents was the objection that petitioner could no longer prosecute the claim because, by reason of the reorganization proceedings and the appointment of a trustee of St. Louis Southwestern, title to the causes of action set forth in said claim became vested in that trustee (R. 8).

The trustee of St. Louis Southwestern has made no step to take over the claim or to enjoin its prosecution by petitioner, nor have the respondents alleged that he has done so.

The claim having been referred to a Special Master, respondents and petitioner requested that the Special Master, before entering upon a hearing on the merits, first dispose of the objection of the respondents which raised

the issue of petitioner's right to further prosecute the claim (R. 34, 50).

On February 2, 1942, the Special Master filed his report (R. 34-44) and supplemental report (R. 44-47), finding and concluding that petitioner should not be allowed to prosecute the claim.

On February 7, 1944, the District Court entered its order approving the reports of the Special Master (R. 49-52), and on June 6, 1945, the Circuit Court of Appeals affirmed the order of the District Court (R. 61-66).

The Circuit Court of Appeals held that after the institution of reorganization proceedings and the appointment of a trustee of St. Louis Southwestern petitioner could no longer prosecute the claim. It based its decision, as had the District Court, on subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act (R. 63).

Subsection (a) provides that the reorganization court shall have "exclusive jurisdiction of the debtor and its property wherever located" and "in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Subsection (c)(2) confers upon the trustee in a Section 77 proceeding the title and powers of a trustee "appointed pursuant to Section 72 or any other section of this title [11 U. S. C. A.], and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding."

The Circuit Court was of the opinion that "the continuance without court permission" of the prosecution of the claim filed previous to reorganization proceedings was "inconsistent with those powers of exclusive management" (R. 65).

Specification of Errors

The Circuit Court of Appeals erred:

1. In affirming the order of the District Court holding that petitioner had no right to continue to prosecute the claim herein and disallowing the claim.

2. In holding, upon the objections of the respondents that all causes of action belonging to St. Louis Southwestern vested in the trustee of that company, that petitioner, a stockholder of St. Louis Southwestern, without any action on the part of said trustee to take over or restrain the prosecution of the claim, was precluded from continuing to prosecute the claim which was filed by him for the benefit of that company in the Rock Island reorganization proceedings previous to the institution of reorganization proceedings of St. Louis Southwestern.

3. In holding that, because under subsection (a) of Section 77 of the Bankruptcy Act the reorganization court is given "exclusive jurisdiction of the debtor and its property wherever located" and "in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose," on that account petitioner, after the institution of reorganization proceedings and the appointment of a trustee for St. Louis Southwestern, was precluded from continuing to prosecute the claim.

4. In holding that because under subsection (c)(2) of Section 77 the trustee of St. Louis Southwestern was given "all the title" and "all of the powers of a trustee appointed pursuant to Section 72 or any other section of this title [11 U. S. C. A.], and, to the extent not in-

consistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding," on that account petitioner was precluded from prosecuting the claim.

5. In failing to take into consideration subsection (*l*) of Section 77, which sets forth that in railroad reorganization proceedings "the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed," and by reason of the failure to do so, holding that petitioner was precluded from prosecuting the claim.

Summary of Argument

The claim was filed by petitioner in behalf of St. Louis Southwestern in the Rock Island reorganization proceedings previous to the initiation of proceedings for the reorganization of and the appointment of a trustee for St. Louis Southwestern. The trustee of St. Louis Southwestern made no step whatsoever to take over the claim or to enjoin its prosecution by petitioner.

The Circuit Court of Appeals held upon the objections of the respondents, trustees of Rock Island, that petitioner had no right to continue to prosecute the claim. The Court based its decision on subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act. In so holding the Circuit Court of Appeals erred.

Under subsection (a) there is expressly conferred on the court exclusive jurisdiction of the debtor and its property wherever located, and the court is also authorized to exercise, in addition to the powers conferred by the section, "all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a re-

ceiver in equity of the property of the debtor for any purpose."

The appointment of a trustee in bankruptcy or of a receiver in equity does not abate a pending suit brought by the bankrupt or debtor.

Bankruptcy courts have always had exclusive jurisdiction over the debtor and its property wherever located.

Therefore, the express conferring upon the court of exclusive jurisdiction did not differentiate the law in reorganization proceedings from the law in a liquidating bankruptcy proceeding so as to preclude the continued prosecution of the claim.

The language conferring upon the court all the powers which a Federal court would have had if it had appointed a receiver in equity was not effective to do this. That language has been held to refer to the substantive powers which such a court exercises over the property in its custody when it appoints a receiver, rather than to its jurisdiction.

Subsection (a) should be read together with subsection *(l)* which states that "the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed."

The title and powers conferred upon the trustee under subsection (c)(2) do not preclude the continued prosecution of the claim. Under this subsection the trustee is given the title and consistently with the provisions of this section the powers of a trustee appointed pursuant to Section 72 (of 11 U. S. C. A.), and to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in equity proceeding.

Inasmuch as Section 72 has to do with the ordinary liquidating bankruptcy, the trustee under subsection (c)(2) is not given any more title or powers than a trustee in bankruptcy. As to the powers of a receiver in equity, there is nothing to show that the St. Louis Southwestern reorganization court gave the trustee such powers.

Since neither the appointment of a trustee in bankruptcy nor of a receiver in equity precludes the continued prosecution of a claim under the circumstances of this case, giving the trustee under subsection (c)(2) such title and powers cannot affect the right of petitioner to continue to prosecute the claim.

The order of the St. Louis Southwestern reorganization court, denying petitioner's application for an order to show cause why an order should not be made permitting him to continue to prosecute the claim, does not preclude the prosecution of the claim by him.

The claim against the Rock Island is meritorious and substantial.

ARGUMENT

I

The appointment of a trustee in bankruptcy or of a receiver in equity does not abate a pending suit brought by the bankrupt or debtor.

If the trustee in a liquidating bankruptcy proceeding or the receiver in an equity receivership fails to take over or enjoin the prosecution of a suit brought or a claim filed previous to the commencement of the bankruptcy or receivership, it may not be pleaded as a defense that the appointment of the trustee or receiver precludes the continued prosecution of the suit or claim by the bankrupt or debtor.

(a) This is the rule as to bankruptcy proceedings:

Thatcher v. *Rockwell*, 105 U. S. 467, 470;
Johnson v. *Collier*, 222 U. S. 538, 540;
Paradise v. *Vogtländische Maschinen-Fabrik* (C. C. A. 3), 99 F. (2d) 53, 55;
Bluegrass Canning Co. v. *Steward* (C. C. A. 6), 175 Fed. 537, 543-544;
Van der Stegen v. *Neuss, Hesslein & Co.*, 270 N. Y. 55, 59-60;
Bennett v. *Associated Theaters*, 247 Mich. 493, 496;
Griffin v. *Mutual Life Ins. Co.*, 119 Ga. 664, 665.
See also Collier on Bankruptcy, 14th ed., vol. 1, pp. 1173, *et seq.*

(b) This is also the rule as to equity receiverships:

Boston Elevated Ry. Co. v. *Paul Boyton Co.* (C. C. A. 1), 211 Fed. 812, 822-823;
Missouri, K. & T. Trust Co. v. *German Nat. Bank* (C. C. A. 8), 77 Fed. 117, 122-123;
Hartford Accident & Indemnity Co. v. *Federal Bond & Mtge. Co.* (C. C. A. 8), 59 F. (2d) 950, 956;
Grimes Savings Bank v. *McHarg*, 217 Iowa 636, 640.

(a) *As to bankruptcy proceedings:*

In *Thatcher* v. *Rockwell*, 105 U. S. 467, plaintiff after bringing suit assigned the claim in suit and thereafter went into bankruptcy under the Bankruptcy Act of 1867. The assignees of the claim continued the suit in the name in which it had been brought. It was held that

the bankruptcy was not a bar to the suit. Chief Justice Waite stated (pp. 469-470):

> "The further charge of the court to the effect that if the assignee [in bankruptcy] expressly consented that the bankrupt might continue to prosecute the suit in his own name, the defendants could not avail themselves of the bankruptcy as a defence, was also right. * * * The true rule is stated in *Eyster* v. *Gaff*, 91 U. S. 521; *Burbank* v. *Bigelow*, 92 id. 179; *Norton* v. *Switzer*, 93 id. 355; *Jerome* v. *M'Carter*, 94 id. 734; *M'Henry* v. *La Société Française, &c.*, 95 id. 58; and *Davis* v. *Friedlander*, 104 id. 570. These cases, although the bankrupt happened to be a defendant, establish the doctrine that under the late bankrupt law the validity of a pending suit, or of the decree or judgment therein, was not affected by the intervening bankruptcy of one of the parties; that the assignee might or might not be made a party; and whether he was so or not, he was equally bound with any other party acquiring an interest *pendente lite*. It is no defence to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor."

In *Johnson* v. *Collier*, 222 U. S. 538, the bankrupt, after filing a voluntary petition but before the appointment of the trustee, brought suit. The Court held that a suit begun even after the commencement of bankruptcy proceedings but before the appointment of a trustee may be continued after such appointment, in the absence of any action on the part of the trustee to enjoin its continued prosecution. After citing *Thatcher* v. *Rockwell*, Mr. Justice Lamar said (p. 540):

> "If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large

as possible, and in some states the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice."

In *Paradise* v. *Vogtlandische Maschinen Fabrik*, 99 F. (2d) 53, after a suit had been brought, the plaintiff was adjudicated a bankrupt and a trustee was appointed. The plaintiff continued the prosecution of the suit. The Court held (p. 55):

"It is settled that a pending action will not abate merely because of the bankruptcy of the plaintiff. Thatcher v. Rockwell, 105 U. S. 467, 26 L. Ed. 949; Hahlo v. Cole, 112 App. Div. 636, 98 N. Y. S. 1049; Griffin v. Mutual Life Ins. Co., 119 Ga. 664, 46 S. E. 870. • • • If the trustees decline or fail to prosecute the action the bankrupt may continue its prosecution to judgment. Bluegrass Canning Co. v. Steward, 6 Cir., 175 F. 537; Griffin v. Mutual Life Ins. Co., supra; Hahlo v. Cole, supra; Bennett v. Associated Theaters Corp., 247 Mich. 493, 226 N. W. 239."

In *Bluegrass Canning Co.* v. *Steward*, 175 Fed. 537, suit was begun by a corporation previous to bankruptcy. The Court said (pp. 543-544):

"Pending the suit below the canning company was adjudicated a bankrupt, and this fact was shown in the case. The creditors declined to prosecute the suit. The court below allowed the suit to go on in the name of the bankrupt upon the execution of a bond indemnifying the bankrupt against costs by J. E. Gunther, a surety upon the attachment bond, • • •

> and the motion to dismiss the suit because of the plaintiff's bankruptcy was denied. * * * The bankruptcy of the corporation did not dissolve it. 2 Clark & Marshall, Private Corporations, p. 863. While the bankrupt trustee may intervene and prosecute a pending suit if he will, yet, if he does not, we see no reason why the bankrupt may not go on with it if he wishes. Loveland on Bankruptcy (3d Ed.) page 428."

In *Van der Stegen* v. *Neuss, Hesslein & Co.*, 270 N. Y. 55, Chief Judge Crane, discussing the effect of the appointment of a trustee in bankruptcy upon a pending suit, said (pp. 59-60):

> "Again, the trustee in bankruptcy is not obliged to maintain or continue every cause of action which the bankrupt may have. He is not bound to accept burdensome property nor unprofitable contracts (*Atchison, T. & S. F. Ry. Co.* v. *Hurley*, 153 Fed. Rep. 503; affd., 213 U. S. 126), nor is he obliged to intervene in any action pending by or against the bankrupt. (*Kessler* v. *Herkoltz*, 132 App. Div. 278; *Fleming* v. *Courtenay*, 98 Me. 401). If a trustee does not take up the prosecution of a suit the defendant is not released even where the right of action is one that might have passed to the trustee. The bankrupt may continue the prosecution of the action. (*Griffin* v. *Mutual Life Ins. Co.*, 119 Ga. 664.)"

In *Bennett* v. *Associated Theaters*, 247 Mich. 493, the plaintiff became bankrupt after bringing an action. The defendant contended that the action could not be maintained since the plaintiff was not the real party in interest, title to the cause of action having vested in the trustee. The Court quoted section 11 (c) of the Bankruptcy Act and said (p. 496):

> "The intervention of the trustee is optional and subject to the direction of the court. The statute was evidently so enacted because it may not be for the best interest of the estate to incur the expense of prosecuting claims of doubtful value. Unless the trus-

tee intervenes, the bankrupt may continue prosecution of the action."

See also opinion of Lamar, J., subsequently of this Court, in *Griffin* v. *Mutual Life Ins. Co.*, 119 Ga. 664, at page 665, for a discussion of the law.

(b) *As to receivership proceedings:*

In *Boston Elevated Ry. Co.* v. *Paul Boyton Co.*, 211 Fed. 812, the defendant pleaded that after the suit had been begun a receiver was appointed for the plaintiff and that the plaintiff was without right to continue to prosecute the suit without leave of court. The Court held (p. 823):

"The suit did not abate by the appointment of a receiver for the plaintiff's rights of action while it was pending. The receiver had not asked to intervene, nor had the defendant moved to have him substituted as plaintiff. The question of his right to maintain the action, as receiver, in the jurisdiction of a court other than that of his appointment did not arise."

In *Missouri, K. & T. Trust Co.* v. *German Nat. Bank*, 77 Fed. 117, which was a suit by a bank which subsequently became insolvent, a motion was made by the defendant to have the receiver of the bank substituted as plaintiff. The Court said (pp. 122-123):

"This motion was denied, and an exception was taken by counsel for the trust company. • • • the denial of the motion is no ground for a reversal of the judgment which was subsequently rendered. The denial of the motion did not prejudice the rights of the trust company in any respect, and if the receiver desires to be substituted as a party plaintiff, so as to be in a position to control the judgment, on making a proper application to the circuit court he can still be made a party for the purpose above indicated."

In *Hartford Accident & Indemnity Co.* v. *Federal Bond & Mtge. Co.*, 59 F. (2d) 950, defendant moved to abate the action in case the receiver did not intervene. The motion was denied.

In *Grimes Savings Bank* v. *McHarg*, 217 Iowa 636, the Court said (at p. 640):

> "The rule is settled in this state that the mere appointment of a receiver long after an action has been commenced will not abate the prosecution of the action by the party for whom a receiver has been appointed."

The above cases clearly indicate that a corporation is not precluded from continuing a suit begun previous to the appointment of a trustee in bankruptcy or of a receiver in equity receivership proceedings.

In the application of this rule there is no valid reason for any distinction between a suit brought by a corporation and a suit brought by a stockholder for the benefit of his corporation, and the rule has been applied accordingly in stockholder's suits. *Friederich W. Meyer* v. *Page*, 112 App. Div. (N. Y.) 625; *McAnarney* v. *Lembeck*, 97 N. J. Eq. 361.

Nor in the application of the rule is there any ground for distinguishing between a claim filed in bankruptcy and a plenary suit.

II

Subsections (a) and (c)(2) of Section 77 of the Bankruptcy Act have not changed the law so as to preclude the continued prosecution of a suit begun or a claim filed previous to reorganization proceedings by a corporation or a stockholder for the benefit of his corporation.

(a) As to the exclusive jurisdiction of the reorganization court under subsection (a):

The Circuit Court of Appeals held that the jurisdiction and power conferred upon the reorganization court under

Section 77 of the Bankruptcy Act, including subsection (a) which confers upon the court "exclusive jurisdiction of the debtor and its property wherever located," serves to differentiate the law in reorganization proceedings from the law in the ordinary bankruptcy or equity receivership in such a way as to preclude the continued prosecution of the claim herein (R. 64).

Petitioner submits that in this the Circuit Court of Appeals erred. Neither the statute nor the decisions interpreting it furnish the slightest ground for the contention that the conferring upon the court of exclusive jurisdiction under subsection (a) or any other provision of the statute precludes the continued prosecution of a suit begun or a claim filed previous to reorganization proceedings.

Bankruptcy courts have always had exclusive jurisdiction of the property of the bankrupt wherever located. This appears from numerous decisions of this Court, handed down prior to the enactment of Section 77.

In *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, an action was brought in a state court in Arkansas to foreclose a mortgage on property in Arkansas owned by the bankrupt. Proceedings in bankruptcy were pending in Texas. The bankrupt and trustee petitioned for the removal of the cause to the United States District Court for the Western District of Arkansas. After removal the trustee filed an answer setting up his possession and title as trustee, and that the bankruptcy court of Texas had exclusive jurisdiction to ascertain the facts and administer the property. The answer was stricken out and a decree of foreclosure and sale was entered. In reversing the judgment and remanding the proceedings to the District Court, the Supreme Court stated (pp. 737-738):

> "The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in

bankruptcy, no matter whether situated within or without the district in which the court sits. * * * It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district. * * * When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. * * * This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property."

See also *United States Fidelity & G. Co.* v. *Bray*, 225 U. S. 205, 217; *Robertson* v. *Howard*, 229 U. S. 254, 260; *Gross* v. *Irving Trust Company*, 289 U. S. 342, 344.

Section 77 was enacted in 1933. The pertinent provision of subsection (a) as then enacted is as follows:

"If the petition is so approved, the court in which such order approving the petition is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located."

Subsection (*l*) of Section 77 (which was subsection (n) when the statute was passed in 1933), provides:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Subsection (a) should be read together with subsection (*l*). The statement that the rights "of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed" would indicate that it was the intention of Congress to guard against any misconstruction of the statute as to the jurisdiction and powers of the court.

In 1935 Section 77 was amended, Congress adopting recommendations contained in a report made in 1934 by the late Joseph B. Eastman, Federal Coordinator of Transportation (House Doc. 89, 74th Cong., 1st Sess.). Mr. Eastman referred to the enactment of Section 77B in 1934 stating that it was based "upon Section 77 but incorporated many minor changes" which "where appropriate should be adopted" (pp. 102-103).

Subsection (a) of Section 77B, in addition to language similar to the language of Section 77 as to exclusive jurisdiction, contained a provision giving to the court the powers of a Federal court which had appointed a receiver in equity of the property of the debtor.

In amending subsection (a) of Section 77 the court was given these powers of a Federal court which had appointed a receiver. It has been held that this reference "to the powers which a federal equity court exercises when it appoints a receiver is to the substantive powers which such a court exercises over the property in its custody rather than to its jurisdiction • • •" (*In re Standard Gas & Electric Co.*, 119 F. (2d) 658, at p. 662). As has been shown, the appointment of a receiver does not abate a pending suit by a corporation (pp. 9, 13-14, *supra*).

There were also added at this time the provisions which immediately follow, which were not in Section 77B, namely, "Process of the court shall extend to and be valid when served in any judicial district," and the provision for the promulgation by the Supreme Court of rules relating to the service of process outside the judicial district.

These provisions as to the extension and service of process have been construed to be procedural rather than jurisdictional (*Thompson* v. *Terminal Shares*, 104 F. (2d) 1, at p. 8).

In the pages that follow petitioner discusses the decisions of this Court and of other Federal courts interpreting subsection (a) of Sections 77 and 77B.

Many of the cited cases involved the question of the right of the trustee to take appropriate action, whether by injunction to protect the property of the corporation situated without the district, or by plenary suit to assert the rights of the corporation against non-residents served without the district. The facts in many of these cases are not similar to the facts in the instant case. These decisions, however, show how little change was effected in the jurisdiction of the court by the enactment of Section 77.

One of the chief purposes of the enactment of Section 77, as appears from the debates in Congress, was to do away with the delays and other disadvantages of ancillary proceedings and the many other abuses of equity receiverships (76 Cong. Rec. 2927, 4887, 5358), and it has been in accordance with that purpose that this Court and other courts, as appears from these cases, have interpreted the Act.

In *Ex Parte Baldwin*, 291 U. S. 610, after the enactment of subsection (a) of Section 77 in its original form, the Supreme Court discussed at length (pp. 615, *et seq.*) the jurisdiction of the reorganization court.

In that case the trustees of the Missouri Pacific Railroad System, in reorganization in Missouri under Section 77, petitioned the Supreme Court for a writ of mandamus to compel the Federal court for Southern Texas, upon their petition for removal, to take jurisdiction of

a suit brought against them in a Texas state court. In holding that the existence of a remedy by injunction of the court in which proceedings for reorganization were pending against the prosecution of the suit in the state court required the denial of the petition for mandamus, the Supreme Court stated that a bankruptcy court had exclusive jurisdiction, and that it could not only issue all writs necessary to protect its possession from physical interference, but was entitled to determine all questions respecting the same; that the jurisdiction was exclusive of the jurisdiction of other courts, and this "regardless of whether the property is located in the district in which the bankruptcy proceeding originated."

The Court did not specifically refer to the language in subsection (a). As in *Isaacs* v. *Hobbs Tie & Timber Co., supra,* it rested its argument upon the principle that where a court of competent jurisdiction takes property into its possession, such property is thereby withdrawn from the jurisdiction of other courts (p. 615).

In *Continental Ill. N. B. & T. Co.* v. *Chicago, R. I. & P. R. Co.,* 294 U. S. 648, the Supreme Court construed subsection (a) without the amendments. In that case the District Court enjoined the holders of collateral notes secured by bonds issued by Rock Island from selling any of the collateral. The assets that it was sought to safeguard by injunction were conceded assets of the debtor's estate. The territorial jurisdiction of the reorganization court was assailed by certain of the defendants on the ground that they had been served outside the district.

In holding that the injunction could issue the Court referred to the "exclusive jurisdiction" of the reorganization court under subsection (a) "of the debtor and its property wherever located", and to the fact that "Section 77 deals with railway corporations whose lines and activities are not confined to a single district or a

single state, but in numerous instances reach into many districts and many states" (p. 683). The Court pointed out that the usefulness of the section would be impaired if the court could not send its process into any state when necessary. The Court said (p. 683):

> "As has already been shown, the equity in the collateral remaining in the railroad company is property; and over this property, wherever located, the federal district court is given exclusive jurisdiction by the precise language of § 77, just quoted. As a necessary consequence of that jurisdiction, the court must have the power to preserve and safeguard the property for the benefit of the trust estate so far as that is compatible with the rights of the pledgees. Jurisdiction over the property wherever located carries with it jurisdiction to enjoin, in a proper case, interferences with the property, and this includes, by necessary inference, the power to send process to that end for service upon the persons to be enjoined wherever they may be found within the United States."

Some years after the enactment of subsection (a) of Section 77 with its amendments, the Supreme Court in *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, again discussed the meaning of exclusive jurisdiction in a railroad reorganization case (p. 483). It cited *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, *supra*, but made no reference to the language of subsection (a).

Subsection (a) in its amended form was construed in *Thompson* v. *Terminal Shares* (C. C. A. 8), 104 F. (2d) 1, cert. denied 308 U. S. 559.

The question there involved was whether the railroad reorganization court had jurisdiction to entertain a suit against non-resident defendants, involving property outside the district held adversely to the bankrupt estate. It was held that the court was without power to do so.

The Court held, Judge Sanborn writing, that the jurisdiction conferred by Section 77 was to be considered "the traditional jurisdiction" of the bankruptcy court "over the property of a bankrupt, wherever located, freed, however, from those limitations which made ancillary proceedings in other districts necessary, and with the powers which Federal equity courts exercise in receivership proceedings, so far as those powers may be necessary or appropriate in order to preserve and safeguard the property in the actual or constructive possession of debtors and in order to carry on their business pending reorganization" (p. 9).

The discussion in that case of the legislative history of subsection (a) is of particular interest.

Judge Sanborn pointed out that while the *Continental Illinois National Bank & Trust Co.* case (*supra*) was pending in the Supreme Court, there being doubt as to the decision, the provision was added which gave the court the powers "not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity," and also the provisions rendering the process of the court valid in jurisdictions outside the reorganization court district.

Referring to the report of Mr. Eastman on which the amendments to Section 77 were based, Judge Sanborn stated that that report nowhere contained any suggestion that "the proposed amendments relating to jurisdiction were intended to confer any additional powers upon the courts of bankruptcy with respect to the reorganization of railroads" (p. 7).

It is apparent from the above decisions that the language of subsection (a) worked no such radical modification in the jurisdiction hitherto exercised by the bankruptcy court as would appear from the opinion of the Circuit Court of Appeals herein.

(b) As to the title and powers conferred on the trustee under subsection (c) (2):

In addition to subsection (a), the Circuit Court of Appeals herein also relied on subsection (c)(2) of Section 77, to the effect that the trustee "shall have all the title and shall exercise * * * all of the powers of a trustee appointed pursuant to section 72* or any other section of this title [11 U. S. C. A.], and, to the extent not inconsistent with this section, *if authorized by the judge*, the powers of a receiver in an equity proceeding."

Section 72 (of 11 U. S. C. A.) has to do with the appointment of trustees in ordinary bankruptcy proceedings. The trustee under Section 77 by these words is thus given no more title or power than has a trustee in the ordinary bankruptcy proceeding.

Furthermore, subsection (c) (2), as well as subsection (a), should be read together with subsection (*l*) *of* Section 77, which provides that, consistently with the provisions of that section, the rights "of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed."

As to "the powers of a receiver in an equity proceeding" "to the extent not inconsistent with this section," which, as appears from the above language of the statute, it is left entirely to the discretion of the judge to withhold from or to confer upon the trustee, there is nothing in the record to show that the reorganization court gave such powers to the St. Louis Southwestern trustee.

Moreover, inasmuch as neither the appointment of a trustee nor of a receiver precludes the continued prosecution of a suit under the circumstances of this case (see pp. 8-14, *supra*) it follows that giving to the trustee in a Sec-

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* Section 72 of 11 U. S. C. A. is reproduced in full in the Appendix, pages 41-42.

tion 77 proceeding all the powers of a trustee appointed pursuant to Section 72 and all the powers of a receiver in an equity proceeding, in no way affects the right of petitioner to continue to prosecute the claim.

(c) As to corresponding subsections of Section 77B.

Section 77B contained language similar to that in Section 77 (a), (c)(2) and (*l*) herein discussed, the corresponding subsections of Section 77B being (a), (c)(2) and (o).* The substance of these provisions of former Section 77B is retained in Chapter X of the Bankruptcy Act (See Sections 111, 115, 186, 187, 112, 114 and 200.)*

The language in Section 77B as to the jurisdiction of the court was construed in *In re Prudence Bonds Corp.* (C. C. A. 2), 75 F. (2d) 262, 263; *In re Prudence Co.* (C. C. A. 2), 96 F. (2d) 157, 159, cert. denied 305 U. S. 616; *United States* v. *Tacoma Oriental S. S. Co.* (C. C. A. 9), 86 F. (2d) 363, 368; and *In re Standard Gas & Electric Co.* (C. C. A. 3), 119 F. (2d) 658, 661.

In the *Prudence Bonds Corp.*, the *Tacoma* and the *Standard Gas* cases, the Court also made specific reference to subsection (o), corresponding to subsection (*l*) of Section 77, and stated that subsection (a) is to be read together with subsection (o). While no reference was made to subsection (c)(2), which contained language similar to Section 77 (c)(2), surely this subsection, in view of the issues passed upon, could not have escaped the notice of the Court.

In *In re Prudence Bonds Corp.*, 75 F. (2d) 262, after the appointment of trustees of the Prudence Corporation under Section 77B, a holder of a Prudence note filed a suit in a state court against the indenture trustee for an accounting of income from the pledged mortgages. The

* Reprinted in the Appendix, pages 39-41.

reorganization court stayed the prosecution of the suit on the petition of the indenture trustee. The Circuit Court of Appeals for the Second Circuit, consisting of Judges Learned Hand, Swan and Chase, in upholding the stay, discussed the language in Section 77B (a) as to exclusive jurisdiction and also Section 77B (o) and stated (p. 263):

> "It is clear both from the language used in these subdivisions, and from the consequences of a contrary ruling, that Congress did not intend the bankruptcy court in proceedings under Section 77B to take over all litigation between the debtor and third persons."

Later, in *In re Prudence Co.*, 96 F. (2d) 157, the Circuit Court of Appeals for the Second Circuit allowed a pending suit to be continued after the appointment of the trustees. The matter came up before Judges Manton, Swan and Chase, two of whom, as has been indicated, participated in the decision in *In re Prudence Bonds Corp., supra.* The trustees had proposed that the attorney who acted for the bankrupt become their attorney and continue the litigation, his compensation to be determined by the bankruptcy court. This proposal the attorney declined to accept, continuing the litigation in the name of the corporation on the basis of his original retainer. The Circuit Court (p. 159) held that the filing of the petition did not terminate his employment nor stay the pending suit; that while under 11 U. S. C. A., Section 29 (c), the trustees had the right to take over the prosecution of the suit, they also had the right to allow the suit to be continued by the bankrupt and later claim the fruits of any recovery. The Court continued:

> "In the case at bar the debtor's trustees chose the latter course. They did not intervene in the pending suit, nor employ Mr. Davison as their attorney; they merely allowed him to perform his contract of retainer with the debtor."

In *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363, the appeal was from an order of the bankruptcy court in a proceeding under Section 77B ordering the Government to pay to the appellees revenues earned under an ocean mail contract. The Secretary of the Treasury and the other Government officials served, moved that the petition be dismissed on the ground that they were residents of the District of Columbia and that they had not been served within the Western District of Washington, where the proceeding had been brought.

The Court expressed the opinion (at p. 367) that the provision in subsection (a) of Section 77, giving the court the powers which a Federal court has in appointing a receiver in equity, in view of the fact that it was limited in its operation by the words "not inconsistent with this section," read together with the provision in subsection (o) under which the court is given the powers of a court of bankruptcy with a similar limitation upon this power, narrowed the question to whether under the provision as to exclusive jurisdiction the lower court had jurisdiction to issue its process outside the district. The Court reversed the order of the lower court, stating (p. 368):

> "We believe that the act giving exclusive jurisdiction of the lower court over the debtor's property wherever located simply means that the res (the debtor's property) is to be considered solely under the jurisdiction of the lower court. Any wrongful invasion, interference, or disposition of that res is to be dealt with solely by the lower court. Jurisdiction over a person outside the lower court's jurisdiction is given to the lower court, only if such person is in some manner invading, interfering, or disposing of the debtor's res, and then only to the extent of preventing or forestalling the invasion, interference or disposition of such res. The act gives no jurisdiction to the trial court to issue its process outside its district in proceedings purely in personam, in which no protection of the debtor's res is involved."

In *In re Standard Gas & Electric Co.*, 119 F. (2d) 658, the trustee in reorganization proceedings under Section 77B brought suit in the District Court against a number of persons for damages arising out of the control exercised by them over the debtor. The resident defendants moved to dismiss on the ground that the court did not have subject-matter jurisdiction; the non-resident defendants on the ground that they had been served outside the district. The Circuit Court of Appeals, in affirming the order of the lower court dismissing the complaint said (at p. 661):

> "* * * The grant of exclusive jurisdiction over the debtor and its property was not a departure from established bankruptcy practice. The Bankruptcy Act * * * from the time of its enactment had conferred upon courts of bankruptcy exclusive jurisdiction over bankrupts and their property. * * *
>
> "In section 77B Congress likewise did not by any express language confer broad jurisdiction over claims by a debtor or its trustee against third persons. We think that such jurisdiction is not to be implied from the grant of jurisdiction over the debtor's property, but that the latter jurisdiction is essentially similar in nature to that possessed by courts of bankruptcy over the property of bankrupts."

As to the purpose of Section 77B the Court said (p. 662):

> "It was to eliminate the necessity for * * * expensive and time consuming ancillary proceedings that Congress conferred upon the reorganization court jurisdiction over the debtor's property 'wherever located.'"

The decision of the Circuit Court of Appeals for the Second Circuit in *Meyer* v. *Kansas City Southern*, a suit brought by this petitioner as a stockholder of St. Louis Southwestern for the benefit of that company, supports the position taken by him herein. In that case the Dis-

trict Court for the Southern District of New York on September 6, 1935, dismissed the complaint, not on the merits but on the ground that the court did not have subject matter jurisdiction. St. Louis Southwestern filed its petition for reorganization on December 12, 1935, and a trustee was appointed on January 3, 1936 (R. 50). The Circuit Court of Appeals in its decision, rendered on June 22, 1936, referred to the appointment of a trustee of St. Louis Southwestern (p. 414), but did not suggest that such appointment abated the representative action brought by petitioner and thus prevented the prosecution of the appeal. *Meyer* v. *Kansas City Southern* (C. C. A. 2), 84 F. (2d) 411, aff'g 11 F. Supp. 937, cert. denied 299 U. S. 607.*

The decision herein is in conflict with decisions of the Circuit Court of Appeals for the Second Circuit, as appears from the two *Prudence* cases above discussed and from *Meyer* v. *Kansas City Southern*.

(d) *The decision of the Circuit Court of Appeals.*

The Circuit Court of Appeals was under a misapprehension in stating that petitioner contended that, because "the procedure in interstate railroad reorganization under § 77 is substantially that of an equity receivership, the appointment of the trustee did not prevent the continued prosecution" of the claim herein (R. 63). Such was not petitioner's contention. Nor did petitioner cite the cases there listed in the margin in support of that contention. Petitioner's contentions before the Circuit Court and the cases cited by him in support thereof do not differ from those set forth in this brief, save that in this brief he has cited some additional cases.

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* Though it does not appear in the record herein, the fact is that after the appointment of the trustee the St. Louis Southwestern moved to stay the appeal. The Circuit Court of Appeals refused to grant the stay. The appeal was argued May 20, 1936.

As has been shown, where suits have been begun before the appointment of a trustee or receiver the courts have not allowed a defendant to plead the appointment of the trustee or receiver as a defense.

Johnson v. *Collier*, 222 U. S. 538, previously discussed (pp. 10-11), has not the limited applicability claimed for it by the Circuit Court of Appeals (R. 63). On the contrary, that case is a reaffirmation and extension of the rule laid down in *Thatcher* v. *Rockwell*, 105 U. S. 467, so as to include within the rule not only suits brought previous to the filing of the petition but also suits brought after the filing of the petition and up to the time of the appointment of the trustee.

In its discussion of *In re Prudence Bonds Corp.*, 75 F. (2d) 262, *supra*, the Circuit Court of Appeals (R. 63-64) fails to bring out that the stay in that case was granted by the *reorganization* court on the ground that the suit would interfere with its disposition of the estate.

The St. Louis Southwestern reorganization court has not enjoined the continued prosecution of the claim. The prosecution of the claim will in no way interfere with the St. Louis Southwestern reorganization proceedings, nor has there been any suggestion that it will do so.

Petitioner in his brief submitted to the Circuit Court of Appeals did not cite *Thompson* v. *Terminal Shares*, 104 F. (2d) 1, because of the similarity to the facts in the instant case, but in order to show the very limited extent by which the jurisdiction of the court was enlarged by the enactment of subsection (a) as amended (see this brief, pp. 20-21, *supra*).

Porter v. *Sabin*, 149 U. S. 473; *Klein* v. *Peter*, 284 Fed. 797; and *Kelly* v. *Dolan*, 233 Fed. 635, cited by the Circuit Court of Appeals herein (R. 65), were all cases where a stockholder brought suit *after* the appointment

of a receiver for the corporation. *Reagan* v. *Midland Packing Co.*, 8 F. (2d) 954, also cited by the Court (R. 65), was a case where a judgment-creditor of a corporation brought suit *after* a receiver had been appointed.

The Circuit Court cites *Adler* v. *Seaman*, 266 Fed. 828, and *Seaman* v. *McCulloch*, 8 F. (2d) 820, as indicating the necessity of the court's passing upon "the desirability of proceeding with the suit" (R. 65).

As appears from the decision in *Adler* v. *Seaman*, while a stockholder's suit was pending in the District Court, seeking the appointment of a receiver of the corporation and injunctive relief against the directors, a bondholder brought suit in the same court also asking for the appointment of a receiver. The company contested the stockholder's suit, but consented to the appointment of a receiver in the bondholder's suit. The District Court allowed the two suits to be consolidated. The Circuit Court of Appeals reversed on the ground that the consolidation was improper.

In *Seaman* v. *McCulloch*, the Circuit Court, stating (p. 826) that the recovery sought in the stockholder's action was involved with certain power contracts and that the receiver's "functioning might be vitally affected by the disposition of these contracts," upheld the order of the lower court dismissing the representative action. The Court stated that the appointment of the receiver "did not *ipso facto et eo instanti*, abate" the stockholder's action.

The facts in the *Seaman* cases differ from the facts in this case. The claim herein was filed by petitioner, not in the St. Louis Southwestern reorganization court but in the Rock Island reorganization court, and is for the benefit of St. Louis Southwestern. Its continued prosecution would not interfere in any way with the functioning of the trustee of St. Louis Southwestern.

(e) Practical considerations underlying the rule.

The rule which permits the continued prosecution of a suit or claim under the circumstances previously outlined is supported by practical considerations. The trustee or receiver in equity has the power to take over the prosecution of the suit or claim, but he may choose not to do so. This may be because he believes that the chances of success are not good and he does not desire to incur the expense of what he considers will be fruitless litigation (*Johnson* v. *Collier*, 222 U. S. 538, at p. 540; *Paradise* v. *Vogtlandische Maschinen-Fabrik*, 99 F. (2d) 53, at p. 55); or for other reasons (*In re Prudence Co.*, 96 F. (2d) 157; *Bluegrass Canning Co.* v. *Steward*, 175 Fed. 537).

Often the trustee may not have the intimate knowledge of the facts or the zeal and persistence necessary for the successful prosecution of arduous litigation, or he may be reluctant to undertake litigation against those connected with the management of the corporation or others. Such a trustee may not be willing expressly to authorize the continued prosecution of a suit by the corporation or a stockholder; yet he may also be unwilling to take the responsibility of restraining its prosecution.

Under the rule that has hitherto prevailed, as has been brought out, causes of action constituting valuable assets, which would otherwise be lost, are thus preserved. In the event of a recovery, all the benefits accrue to the bankrupt estate or corporation in receivership and this without the trustee or receiver incurring the often heavy burden and expense involved in the conduct of the litigation.

III

The order of the St. Louis Southwestern reorganization court denying petitioner's application for an order to show cause does not preclude the prosecution of the claim.

Respondents have filed with this Court a certified copy of a certain order entered by Judge Moore of the St. Louis Southwestern reorganization court on February 28, 1944, denying petitioner's application for an order to show cause why an order should not be made permitting him to continue to prosecute the claim filed by him in the Rock Island reorganization proceedings. The said order of Judge Moore forms part of the papers in respondents' motions dated February 8, 1945, to dismiss petitioner's appeal to the Circuit Court of Appeals and for leave to supplement the record in that court.

Respondents could have had the papers on these motions, which included the order of Judge Moore, made part of the printed record herein. They failed to have this done.

Petitioner does not regard these moving papers as relevant to the question presented to this Court. Inasmuch, however, as respondents in their brief in opposition to the petition for certiorari have referred to said motions and apparently attach great importance to the said order, petitioner filed a certified copy of said motion papers in this Court, and reproduced a copy thereof in the appendix to his reply brief in support of his petition. The papers are as follows:

(1) Respondents' motion to dismiss the appeal and motion for leave to supplement the record, including the

said order of Judge Moore; (2) order of the Circuit Court of Appeals of February 15, 1945, denying the motion to dismiss with leave to renew; (3) petitioner's answer dated May 3, 1945, to said motions.

Respondents in their brief of April 5, 1945, submitted to the Circuit Court of Appeals, renewed their motions, but there was no further order by the Court thereon, nor did the Court in its opinion mention the order of Judge Moore, thus called to its attention.

As shown on its face, the order in question is an order denying an application for an order to show cause. The purpose of such an application, it is unnecessary to state, is to shorten the time in which a motion under the rules must be made returnable. A denial of such an application is not a denial of the motion which it is sought to bring on in this way.

As appears from his answer to respondents' motion to dismiss the appeal, petitioner in New York was informed over the telephone by his local counsel in St. Louis that upon the argument of the order to show cause the point was raised by the trustee of St. Louis Southwestern that petitioner had unduly delayed making his application. This apparently was the reason for the denial of the application.

But even assuming that there had been a motion duly noticed and a decision had been rendered on the merits (which was not the case), such a denial would not have constituted a stay and would not affect the question presented to this Court.

The fact that the claim against Rock Island has been formally called to the attention of the St. Louis Southwestern trustee by the application for the order to show cause would indicate this at least, however,—that the trus-

tee had given consideration to the causes of action set forth in the claim and had deliberately chosen neither to take over the claim, nor, on the other hand, to take steps to restrain its continued prosecution by petitioner.*

IV

The claim against Rock Island is meritorious and substantial.

The Special Master was not requested to submit a report on the merits of the claim. This appears from his report in which he states (R. 34):

> "The trustees of the debtor filed supplemental objections urging that Meyer had no standing to continue prosecution of the claim herein in view of the appointment of the trustee for St. Louis Southwestern. I have been requested to submit a report on that question before going into a hearing on the merits of the claim. This report accordingly deals with that question."**

Nevertheless, the Special Master in his report (R. 34-36) and his supplemental report (R. 46-47) discusses the merits of the claim.

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* It appears from the opinion of the District Court in *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914 (confirming the report of the Commission in *St. Louis S. W. Ry. Co. Reorganization*, 249 I. C. C. 5), that the trustee of St. Louis Southwestern made an investigation of petitioner's charges. The trustee found no basis for the institution of proceedings against the parties accused (pp. 924, 926). Though it is not shown by the record in this case, the proof of claim filed in the Rock Island reorganization proceedings was placed in evidence in the hearings in the St. Louis Southwestern reorganization proceedings before the District Court (Exhibit 146).

** The Circuit Court of Appeals was under a misapprehension, as it thus appears, when it stated that the Special Master had "heard the evidence and filed his report" (R. 62). There was no hearing whatsoever before the Special Master.

The Circuit Court of Appeals quotes the report of the Special Master to the effect "that claimant had filed a petition before the Interstate Commerce Commission in the reorganization proceedings involving St. Louis [Southwestern] based upon the allegations set forth in the claim filed in the case before us; and that the Commission had found that there was not sufficient evidence of a claim against the debtor to justify an investigation" (R. 62).

Petitioner discusses briefly some of the facts which are indicative of the meritorious and substantial nature of the claim.

The Interstate Commerce Commission, it is true, found that an investigation was not justified. Chairman Eastman, however, in a strong dissent indicated that he was of the opinion that petitioner in the said hearings before the Commission had to a large extent sustained the charges in his petition for investigation. He expressed the belief that the Commission should have granted the petition for investigation (R. 17). Referring to the part played by Rock Island in the undoing of St. Louis Southwestern, the Chairman stated that the downfall of that road began when Rock Island first acquired a dominant stock interest in the property in March, 1925 (R. 17).

After the report of the Commission, extended hearings were held before Judge Davis of the District Court in October and November 1942 upon objections raised to the plan of reorganization. Before any decision had been rendered, Judge Davis passed away and Judge Moore succeeded him in the case.

In the decision of the District Court confirming the report of the Commission, *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914, the Court held, at page 927, that "the validity of Meyer's charges of bad faith" was a matter "requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements,

freight loadings, financial statements, and other data peculiarly within the comprehension of the I. C. C. We are of the opinion that the Commission has had full opportunity to pass on these matters and exercise informed judgment. We are, therefore, not disposed to refer the plan back to the Commission on this account and, accordingly, overrule Meyer's objections to the plan of reorganization."

In his appeal from the decision of the District Court to the Circuit Court of Appeals for the Eighth Circuit, petitioner has taken the position that the report of the Commission is of a highly arbitrary nature and is contrary to the proof in the record, and that Judge Moore gravely erred in failing to evaluate either the proof placed in the record before the Commission or the large amount of additional proof placed in the record in the hearings before Judge Davis. Indeed the important proof placed in the record in the hearings before Judge Davis has thus not been considered either by the Interstate Commerce Commission or by the District Court.

The Department of Justice has shown that it is not in accord with the findings of the majority report of the Commission. In March 1945 the Government, through its Attorney General, filed a brief as *amicus curiae* in the appeal from the decision of the District Court. In its brief the Government asked that the claim of Southern Pacific as a creditor in the principal amount of $17,882,250, and as a stockholder owning 87% of the stock of St. Louis Southwestern, be subordinated to the interest of the minority stockholders on the ground that the control exercised by Kansas City Southern over St. Louis Southwestern was unlawful, and "that the debtor had a valuable cause of action for triple damages under the antitrust laws which it was prevented from bringing during its subsequent control by Southern Pacific." Rock Island was a co-conspirator with Kansas City Southern and others in the

illegal control exercised over St. Louis Southwestern by Kansas City Southern referred to in the Government's brief, and petitioner so alleged in the claim filed herein.

The suit instituted by the Government on August 23, 1944, against forty-seven Class I railroads owning lines west of the Mississippi, two important banking houses and others, charged a conspiracy of a far-reaching nature, as appears from the Government's complaint in that suit together with the "Western Agreement" annexed as an exhibit. Union Pacific, Southern Pacific, Kansas City Southern, Missouri-Kansas-Texas, the trustees of Rock Island and the St. Louis Southwestern trustee are joined as defendants. The violations of the Sherman Antitrust Act charged are alleged to have continued at least up to the time of the filing of the complaint. These violations include not only a conspiracy to keep up rates, but also nineteen other offenses. The Rock Island and the St. Louis Southwestern and their respective trustees, petitioner avers, were involved in these violations. The failure of Southern Pacific to carry out its contractual obligations to St. Louis Southwestern and to take various other steps in the development of St. Louis Southwestern, petitioner is convinced, resulted in part from the illegal combination charged.

The Government's suit is referred to in petitioner's answer to respondents' motions to dismiss the appeal and to supplement the record, reproduced in the appendix (pp. 32-33) to petitioner's reply brief in support of petition for writ of certiorari.

The facts revealed by the Government's suit were regarded by petitioner as constituting newly discovered evidence of the utmost importance and relevancy to his charges of conspiracy by which St. Louis Southwestern was controlled, its assets wasted and its earnings impaired. He therefore moved before the Circuit Court

of Appeals for the Eighth Circuit in December, 1944 that the St. Louis Southwestern proceedings be remanded to the District Court with instructions to remand to the Interstate Commerce Commission in order that the Commission might decide whether to institute an investigation into the facts alleged by the Government in its said suit.

On the argument, the Court ruled that the submission of the motion be set aside without prejudice and be heard in connection with the hearing upon the merits of the appeals. The appeals together with said motion were argued on April 6 and 7, 1945, and are now being considered by the said Circuit Court of Appeals.

CONCLUSION

It is submitted that the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the cause remanded to that Court with appropriate instructions.

Respectfully submitted,

WALTER E. MEYER,
Petitioner *Pro Se*.

SONNENSCHEIN, BERKSON, LAUTMANN,
LEVINSON & MORSE,
Attorneys for Petitioner.

Dated: December 10, 1945.

Appendix

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U. S. C. A. 205) are as follows:

"(a) * * * If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and circuit courts of appeal in exercising the jurisdiction herein conferred upon them. * * *",

"(c)(2) * * * The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor. * * *"

"(*l*) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of

the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

The corresponding provisions of Section 77B of the Bankruptcy Act (11 U. S. C. A. 207) were as follows:

"(a) * * * If the petition or answer is so approved, an order of adjudication in bankruptcy shall not be entered and the court in which such order approving the petition or answer is entered shall, during the pendency of the proceedings under this section, have exclusive jurisdiction of the debtor and its property wherever located for the purposes of this section, and shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature. * * *"

"(c)(2) * * * every such trustee, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all the powers of a trustee appointed pursuant to section 72 of this Act, and if authorized by the judge, the same powers as those exercised by a receiver in equity to the extent consistent with this section, and, subject to the authorization and control of the judge, the power to operate the business of the debtor during such period, fixed or indefinite, as the judge may from time to time prescribe;"

"(o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect

to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved."

The corresponding provisions of Chapter X of the Bankruptcy Act (Sections 111, 115, 186, 187, 112, 114, 200) (11 U. S. C. A. 511, 515, 586, 587, 512, 514, 600) are as follows:

§ 511. *Exclusive jurisdiction over debtor and property.* Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located.

§ 515. *Jurisdiction as in insolvency.* Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature.

§ 586. *Trustee; title.* A trustee, upon his appointment and qualification, shall be vested with such title as a trustee appointed under section 72 of this title would have.

§ 587. *Same; rights, powers and duties.* Where not inconsistent with the provisions of this chapter, a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 72 of this title, and, if authorized by the judge,

shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor.

§ 512. *Matters prior to approval of petition; jurisdiction, powers and duties.* Prior to the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding before adjudication.

§ 514. *Matters upon approval of petition; jurisdiction, powers, and duties.* Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

§ 600. *Rights, duties, and liabilities of creditors, etc.* Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, before the approval of the petition, as in a bankruptcy proceeding before adjudication and, upon the approval of the petition, as in a bankruptcy proceeding upon adjudication.

Section 44 of the Bankruptcy Act (11 U. S. C. A. 72) reads as follows:

"(a) The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the

first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee so appointed fails to qualify as herein provided, the court shall make the appointment. If the bankrupt is a face-amount certificate company, as defined in section 80a—4 of Title 15, the court alone shall make the appointment; but the court shall not make such appointment without first notifying the Securities and Exchange Commission and giving it an opportunity to be heard.

"(b) Such creditors may, at their first meeting, also appoint a committee of not less than three creditors, which committee may consult and advise with the trustee in connection with the administration of the estate, make recommendations to the trustee in the performance of his duties and submit to the court any question affecting the administration of the estate.

"(c) An attorney shall not be disqualified to act as attorney for a receiver or trustee merely by reason of his representation of a general creditor."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 392

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

WALTER E. MEYER,
Petitioner Pro Se.

SONNENSCHEIN, BERKSON, LAUTMANN, LEVINSON & MORSE,
Attorneys for Petitioner.

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Respondents.

PETITIONER'S REPLY BRIEF

Statement

Respondents fail to meet petitioner's argument as to the law.

They discuss matters not referred to in the opinion of the Circuit Court of Appeals and not involved in the issue presented to this Court.

They contend, without justification, that the claim filed herein is without merit.

As to the respondents' statement of the facts connected with the claim herein

Respondents in their brief indulge in statements of an inaccurate nature. Petitioner does not deem it necessary for the purpose of this reply brief to undertake to correct all of these statements.

It is desirable, however, to point out an instance of repeated misrepresentation by respondents. Petitioner in his main brief (p. 31), referring to the order of Judge Moore of the St. Louis Southwestern reorganization court of February 28, 1944, a certified copy of which was filed by respondents with this Court, pointed out that said order was an order denying petitioner's application for an order to show cause why an order should not be made permitting him to continue to prosecute the claim filed by him. Despite this, respondents repeatedly refer to said order as an order denying petitioner leave to prosecute the claim herein.

With respect to remarks reflecting on petitioner's motives in endeavoring to assert the rights and protect the interests of St. Louis Southwestern, petitioner, upon oral argument, will be very glad to answer any question that the Court chooses to direct to him.

In view of the statements contained in respondents' brief, a few salient facts concerning the illegal control exercised over St. Louis Southwestern are here set forth.

Chicago, Rock Island & Pacific Railway Company acquired a dominant stock interest in St. Louis Southwestern in March 1925. It held this dominant stock interest until October 1925. This is admitted by respondents in their brief (p. 4).

Rock Island applied to the Interstate Commerce Commission for authority to acquire stock control of St. Louis Southwestern. C. V. Burnside, Assistant Director of the

Bureau of Finance of the Commission, in a proposed report recommended that the application be denied. Mr. Burnside found that Rock Island was a competitor of the St. Louis Southwestern, and admonished Rock Island for its exercise of control over St. Louis Southwestern without the authorization of the Commission.

Without waiting for a decision by the full Commission upon Mr. Burnside's proposed report, in October, 1925, Rock Island sold its dominant stock interest in St. Louis Southwestern to the Kansas City Southern Railway Company. The Kansas City Southern is also a competitor of the St. Louis Southwestern.

As set forth in the proof of claim herein, the acquisition by Rock Island, a competitor of St. Louis Southwestern, of a controlling stock interest in St. Louis Southwestern was in violation of the Clayton Antitrust Act and also of the Sherman Act, and the sale by Rock Island to the Kansas City Southern, another competitor of St. Louis Southwestern, caused the Kansas City Southern to violate the antitrust laws. The transaction was in breach of the fiduciary relationship that Rock Island was in to St. Louis Southwestern. Rock Island realized a profit of $2,467,000 in the above dealings in St. Louis Southwestern stock for which it is asked in the claim that Rock Island account to St. Louis Southwestern (R. 4-6).

In July, 1926, Kansas City Southern applied to the Commission for authority to acquire stock control of St. Louis Southwestern and Missouri-Kansas-Texas Railroad (a competitor of Kansas City Southern and St. Louis Southwestern), which road Kansas City Southern also controlled without the authorization of the Commission.

The Commission in 1927 denied the applications for unification of the three roads (*Unification of Southwestern Lines*, 124 I. C. C. 401).

In its report the Commission held that the control over St. Louis Southwestern and Missouri-Kansas-Texas by Kansas City Southern without the authorization of the Commission "constituted violations of section 7 of the Clayton Antitrust Act and perhaps also of the Sherman Act" (*Unification of Southwestern Lines*, 124 I. C. C. 401, at p. 430).

The Commission also pointed out the danger to minority stockholders of St. Louis Southwestern by the illegal control thus exercised by Kansas City Southern, through impairment of St. Louis Southwestern's earnings by diversions of traffic, and deterioration of its property and service to patrons. "By these methods," said the Commission, "the price of the stock of the controlled carrier can be depressed and its acquisition by the controlling carrier or its stockholders facilitated" (p. 433).

In 1928, the Commission brought proceedings under the Clayton Act against the Kansas City Southern to compel it to divest itself of its stock interest in St. Louis Southwestern and Missouri-Kansas-Texas.

On April 15, 1929, while the said proceedings under the Clayton Act were pending, a syndicate composed of New York Investors, Inc., its President and Chairman, and others, acquired Kansas City Southern's stockholdings in St. Louis Southwestern (*Interstate Commerce Commission v. Kansas City Southern*, 156 I. C. C. 359, at p. 365).

Leading members of the said syndicate had previously actively participated in the illegal control exercised by Kansas City Southern over St. Louis Southwestern and Missouri-Kansas-Texas. At least in the opinion of minority members of the Commission, the said transaction was collusive and served to continue Kansas City Southern in control of St. Louis Southwestern. (For Commissioner Eastman's dissenting opinion, which clearly shows the collusive nature of this sale by Kansas City Southern to

the syndicate, in which dissent other members of the Commission joined, see *I. C. C.* v. *Kansas City Southern*, 156 I. C. C. 359, at p. 363).

In 1930 and nine months after the beginning of the financial panic in October 1929, Southern Pacific purchased the syndicate's stock interest in St. Louis Southwestern, placed two representatives on the board of St. Louis Southwestern and applied to the Interstate Commerce Commission for authority to acquire stock control of that company. In 1932 Southern Pacific's application was granted by the Commission.

During the period of illegal control from 1925 to 1932, exercised over the St. Louis Southwestern first by Rock Island and then by Kansas City Southern, whether directly or indirectly through the syndicate above referred to, petitioner showed in hearings before the Commission, that by comparison with four other specified Southwestern roads,—the Kansas City Southern, Missouri-Kansas-Texas, Missouri Pacific and St. Louis-San Francisco,—St. Louis Southwestern failed to hold its own and suffered a loss in freight revenues of $27,626,157, and by comparison with the railroads of the Southwestern Region as a whole, of $23,676,728. (See *St. Louis Southwestern Ry. Co. Reorganization*, 249 I. C. C. 5, at pp. 84 *et seq.*)

Rock Island's influence upon the board of directors of St. Louis Southwestern did not cease with the sale of its controlling stock interest to Kansas City Southern. Charles Hayden, Chairman of Rock Island's board of directors, continued as a director of St. Louis Southwestern during the years 1926 and 1927.

As appears from the Commission's report, *St. Louis Southwestern Ry. Co. Reorganization*, 249 I. C. C. 5, at pp. 111 *et seq.*), petitioner charged that Rock Island, taking advantage of its control over St. Louis Southwestern and thereafter conspiring with Kansas City Southern and with Southern Pacific, was able to divert much traffic from

St. Louis Southwestern-Southern Pacific joint routes to joint routes which Rock Island maintained with Southern Pacific.

Petitioner served as a director of St. Louis Southwestern in 1926 and from 1929 to 1934, elected through the votes of the minority stockholders under the system of proportional representation authorized under the laws of Missouri.

Reference is made by respondents in their brief (pp. 5-6) to a suit by petitioner instituted in the Federal District Court in New York, in which it is said he asked that a receiver be appointed to assert the demand for damages on behalf of St. Louis Southwestern.

It is a fact that petitioner in March 1934, after unsuccessful efforts to obtain fair treatment for St. Louis Southwestern, ceased to serve as a director of the company, and instituted a suit in behalf of himself and other stockholders against Southern Pacific, Kansas City Southern, members of important New York banking houses and others. The trustees of Rock Island were named as defendants in the suit but they were not served.

In April 1934, petitioner filed in the Rock Island reorganization proceedings the claim herein for the benefit of St. Louis Southwestern.

On September 6, 1935, the District Court dismissed the complaint in petitioner's representative action on the ground that it lacked subject-matter jurisdiction (*Meyer* v. *Kansas City Southern*, 11 F. Supp. 937). The decision of the District Court was thereafter affirmed by the Circuit Court of Appeals (84 F. (2d) 411), and certiorari was denied by the Supreme Court (299 U. S. 607).

The bill of complaint in the representative action brought by petitioner asked for damages and for an accounting. The Supreme Court had held that a stockholder could not

assert a cause of action under the antitrust laws for the benefit of his corporation either at law or in equity (*Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27; *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261), Mr. Justice Holmes in the *Fleitmann* case made a suggestion that perhaps if the bill in that case had been framed on a different theory, the decision of the Court would have been otherwise. Petitioner, following the suggestion of Mr. Justice Holmes, therefore asked in his bill of complaint, in addition to the other relief sought, that a receiver be appointed for St. Louis Southwestern for the special purpose of asserting causes of action which the company had under the antitrust laws.

Respondents in their brief (p. 7) make reference to Chairman Eastman's dissenting opinion in the St. Louis Southwestern reorganization proceedings in which Mr. Eastman refers to the conjuring up by petitioner of "conspiracies which go beyond the reasonable probabilities of the situation" (R. 26).

That remark of Chairman Eastman does not refer to the matters so vividly set forth by him in his dissenting opinion, which indicate that he believed that Rock Island had played a leading role in the downfall of St. Louis Southwestern (R. 17, *et seq.*).

Chairman Eastman, it is clear from his opinion, read together with the majority report of the Commission (249 I. C. C. 5, at p. 49), was alluding to the petitioner's charge that Union Pacific continued in control of Southern Pacific long after the decree of the Supreme Court in *United States* v. *Union Pacific*, 226 U. S. 61, dissolving the illegal combination by which Union Pacific controlled Southern Pacific, and that acting under the influence of interests close to Union Pacific, Southern Pacific instigated the filing of the petition for reorganization of St. Louis Southwestern.

It was not alleged by petitioner in the claim herein that Rock Island was in league with Union Pacific. Therefore, whether petitioner was justified in the charge in question is quite beside the issue involved in this case.

As to the reference to *diversions of traffic* in the dissenting opinion, Chairman Eastman stated that he "has not been able to study it with the greatest of care."

As to respondents' discussion of the law

1. Respondents do not effectively controvert the point made by petitioner that if the trustee or receiver fails to take over or to enjoin the prosecution of a suit brought previous to bankruptcy or receivership, it may not be pleaded as a defense that the appointment of the trustee or receiver vested such title in him as to abate the suit (Petitioner's Main Brief, pp. 8 *et seq.*).

They also fail to answer petitioner's argument that subsection (a) of Section 77 of the Bankruptcy Act, which expressly conferred exclusive jurisdiction on the reorganization court, did not serve to differentiate the law in reorganization proceedings from the law in ordinary bankruptcy or equity receivership proceedings so as to preclude the continued prosecution of a suit begun or a claim filed previous to the commencement of reorganization proceedings (Petitioner's Brief, pp. 14 *et seq.*). It was on subsection (a) of Section 77 that the Circuit Court of Appeals relied in holding that whatever the law was previous to its enactment, this subsection prevented the continued assertion of the claim by petitioner in behalf of St. Louis Southwestern (R. 64).

Respondents point to the amendment to the original subsection (a), which gives to the reorganization court "in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a

Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

It is their contention that this language of the amendment, read together with subsection (c)(2), which gives to the trustee "if authorized by the judge, the powers of a receiver in an equity proceeding," precludes the continued prosecution of the claim against Rock Island.

A receiver in an equity proceeding does not obtain title to the property of the debtor (*Union National Bank of Chicago* v. *Bank of Kansas City*, 136 U. S. 223). It is difficult, therefore, to see why respondents set such store by this language of the statute.

And, as has been shown, the appointment of a receiver for a corporation does not abate a suit by the corporation or by a stockholder suing for the benefit of his corporation (Petitioner's Main Brief, pp. 8 *et seq.*).

As petitioner has previously stated, there is nothing in the record to show that the trustee of St. Louis Southwestern has been authorized by the judge to exercise the powers of a receiver in an equity proceeding. Assuming that he has been so authorized, respondents do not make the claim that he has exercised such powers.

In all of the cases cited by the respondents in their brief (pp. 15 to 22), the receiver or trustee was appointed previous to the bringing of suit, in contrast to the instant case where the claim was filed previous to the institution of proceedings for reorganization and the appointment of a trustee of St. Louis Southwestern. In a number of the cases cited, the suit was not derivative. In most of these cases the suit was against the directors or officers of the corporation in receivership or bankruptcy.

Four of the cases cited by respondents were referred to in petitioner's main brief (pp. 28-29).

In *Porter* v. *Sabin*, 149 U. S. 473, a stockholders' representative suit against directors of the company, the receiver of the corporation was appointed on May 10, 1884. The stockholders' bill in equity was filed in September 1887, over three years thereafter.

In *Kelly* v. *Dolan* (C. C. A. 3), 233 Fed. 635, another representative action by stockholders against directors, it appears from the opinion of the Circuit Court of Appeals (p. 638), and also from the opinion in the District Court (*Kelly* v. *Dolan*, 218 Fed. 966, at p. 968), that the receiver was appointed previous to the suit.

In *Klein* v. *Peter* (C. C. A. 8), 284 Fed. 797, numerous stockholders filed suit against the company, its officers and managers, claiming that as stockholders they had been defrauded of large sums of money by the acts of said officers. The suit was apparently not a representative action for the benefit of the corporation. At the time the suit was brought, the corporation was in the hands of a receiver (p. 798).

In *Reagan* v. *Midland Packing Co.* (C. C. A. 8), 8 F. (2d) 954, a judgment-creditor endeavored to levy upon the assets of the corporation. At the time of the bringing of the action the corporation was in receivership. (See also *Reagan* v. *Midland Packing Co.*, 298 Fed. 500, 508.)

The other cases cited by respondents are equally ineffective to refute petitioner's contentions.

In *Austin* v. *Garard* (C. C. A. 7), 61 F. (2d) 129, the action was in the nature of a creditors' bill against the trustees of an investment trust. The prayer asked for the appointment of a receiver. Certain stockholders, alleging misconduct on the part of the officers and managers of the trust and seeking no relief in behalf of the corporation as stockholders, sought to intervene in the equity suit. The Court denied the application, holding that the stockholders had misconstrued the object and purpose of a petition to intervene.

Swope v. *Villard* (C. C. S. D. N. Y.), 61 Fed. 417, was an action against directors of the corporation for whose benefit suit was brought. At the time of the commencement of the suit the corporation was in receivership. In *In re Swofford Bros. Dry Goods Co.* (W. D. Mo.), 180 Fed. 549, an action against the corporation and its president, the company was adjudicated a bankrupt on October 28, 1909, and the stockholder's bill was filed on May 20, 1910.

In *Ames* v. *American Tel. & Tel. Co.* (C. C. Mass.), 166 Fed. 820, plaintiff, a stockholder, sought to recover damages from another corporation because of control of his company in violation of the Sherman Antitrust Act. At the time of the commencement of the action the corporation was in the hands of a receiver (p. 823). It was held that the corporation alone could maintain an action at law under the Sherman Act.

In *Lewis* v. *Council* (E. D. N. Car.), 291 Fed. 148, the suit was by a creditor against the officers of the company. The corporation was adjudged bankrupt in November 1920 and a trustee was appointed. The bill was filed in July 1921 (p. 156).

In *Lewis* v. *Lilliston* (U. S. App. D. C.), 89 F. (2d) 847, after a statutory receiver of a banking corporation had been appointed under the laws of Virginia, certain creditors brought suit against the cashier, suing for themselves and all other creditors similarly situated. The Court held that such suit could not be maintained without first showing that the creditors had applied to the court for an order requiring the receiver to bring suit. The Court allowed the plaintiffs to amend their bill by showing that they had made application to the Virginia court.

Respondents inadequately discuss *Adler* v. *Seaman* (C. C. A. 8), 266 Fed. 828, and *Seaman* v. *McCulloch* (C. C. A. 8), 8 F. (2d) 820. That these decisions cannot

be cited in support of the decision of the Circuit Court of Appeals herein appears from the discussion in petitioner's main brief (p. 29).

Respondents incorrectly state in their brief (p. 18), that the cases cited by petitioner do not deal with derivative suits.

Friederich W. Meyer v. *Page*, 112 App. Div. (N. Y.) 625, and *McAnarney* v. *Lembeck*, 97 N. J. Eq. 361, were suits brought by stockholders for the benefit of the corporation. The appointment of a trustee in the *Page* case and of receivers in the *Lembeck* case, the courts ruled, did not preclude the continued prosecution of the stockholder's derivative suit (see petitioner's main brief, p. 14).

2. Respondents argue in their brief (p. 23) that the continued prosecution of the claim must abate because petitioner failed to join the corporation as a party defendant. They refer (p. 24) to the position taken by the Special Master to that effect (R. 36, 43, 45).

The Circuit Court of Appeals in affirming the decision of the District Court did so solely on the ground that subsections (a) and (c)(2) of Section 77 prevented the continued prosecution of the claim. This question, therefore, is not before this Court.

However, it may be stated that after the Special Master in his report had found that petitioner should not be allowed to prosecute the claim because:

> "Neither the corporation nor its trustee in the reorganization proceedings has been brought into the jurisdiction of this court by summons" (R. 36),

petitioner requested that the report be altered to permit him to petition the St. Louis Southwestern reorganization court for authority to join the trustee, and that he be permitted to amend his claim to set forth such authorization and joinder (R. 45).

As to this the Special Master held in his supplemental report (R. 45):

> "* * * For two reasons this request should in my opinion be denied: First, because this is not a claim that may be remedied by amendment; and second, because even if a new claim could be filed, the discretion of this court should not in this instance be exercised to permit such filing, by way of amendment or otherwise."

The Special Master, it is true, regarded the filing of a proof of claim by a stockholder as comparable to the service of a summons and complaint in a stockholder's derivative suit. He reasoned because of this that in connection with the filing of a proof of claim in a reorganization proceeding the beneficiary corporation must be joined. Because of failure to join the corporation, the Master stated, "there is no stockholders' suit now in existence" (R. 43, 45-46).

In no part of his report or supplemental report does the Special Master refer to a case involving a reorganization or bankruptcy proceeding in support of his view that it was necessary to join the corporation or trustee in order to constitute a valid claim. The cases cited by him are representative actions instituted by stockholders for the benefit of corporations.

The filing of a claim in a bankruptcy or reorganization proceeding is not comparable to the institution of a plenary suit but differs from it in a number of ways, as for example:

(1) In a plenary suit the burden is upon the plaintiff to go ahead with his case after issue is joined. By way of contrast, in an ordinary or liquidating bankruptcy proceeding, after a claim has been filed, the burden is upon the party objecting to the claim to go forward with the proof of his objections; in a reorganization proceeding the manner of proof is left to the discretion of the court.

The proof of claim setting forth the facts out of which the claim arises, at least in the ordinary liquidating bankruptcy proceeding, is considered an affidavit or a deposition. It is distinctly not a pleading.

As was stated in *In re Century Silk Mills, Inc.*, 296 Fed. 713 (at p. 714):

> "A sworn proof of claim would ordinarily be prima facie evidence requiring an objector to go forward. It is the objection, not the claim, which is pointed out for hearing and determination. Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 589. * * * The proof of claim is not a pleading, but a deposition, which must set forth the evidence with particularity. Collier on Bankruptcy (13th Ed.), vol. 2, p. 1138."

See also *Bache* v. *Louisiana Oil Refining Corp.* (C. C. A. 5), 97 F. (2d) 445.

(2) Suits instituted by a stockholder for the benefit of a corporation are actions *in personam*. Personal service upon all parties in interest is always necessary in stockholder's suits.

By way of contrast, and as stated in *Hanover National Bank* v. *Moyses*, 186 U. S. 181 (at p. 192):

> "Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*, * * * *Service of process or personal notice* is not essential to the binding force of the decree." (Italics ours.)

In the ordinary representative action by a stockholder for the benefit of his corporation, it has been held that it is necessary to join the corporation in order "that any decree that shall be made on the merits shall conclude the corporation" (*City of Davenport* v. *Dows*, 18 Wall. 626); otherwise the corporation could renew the litigation in another suit.

The proceedings in bankruptcy being *in rem*, there is not the same necessity for bringing in a party by personal service as there is in the ordinary plenary suit.

(3) Bankruptcy proceedings, in contrast to court actions, are essentially administrative. The methods and procedure of business, not that of the law court, are characteristic of bankruptcy proceedings.

In *Whitney* v. *Dresser*, 200 U. S. 532, this Court held (at pp. 535-536):

> "Bankruptcy proceedings are more summary than ordinary suits. Judges of practical experience have pointed out the expense, embarrassments, and delay which would be caused if a formal objection necessarily should put a creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it."

At an early date the Supreme Court, referring to the then Bankruptcy Act, stated:

> "The Act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to the usual modes of trial * * *." *Wiswall* v. *Campbell*, 93 U. S. 347.

Other courts have held:

> "Proceedings in bankruptcy are flexible and liberal and in their major aspects administrative. Such proceedings are intended to be and usually are carried out informally. Fazakerly v. E. Kahn's Sons Co., supra, 75 F. (2d) 110, page 113." *In re Austin Resort & Land Co.*, 12 F. Supp. 459, at page 462.

> "Bankruptcy is essentially a commercial branch of the law, and its procedure ought to be kept as direct and informal as possible. A party will always be allowed to file such pleadings as are reasonably necessary to make clear his own position. * * *." *In re Ponzi*, 15 F. (2d) 113, at page 114.

(4) In contrast to the relationship between the parties in the ordinary plenary suit or adversary proceeding, the trustee in bankruptcy is in a fiduciary relationship to the claimant.

In *In re Wrisley Co.*, 133 Fed. 388, at page 390, it is stated:

> "He [the trustee] stands to creditors in a fiduciary relation. * * * In all matters between creditors and bankrupt he should stand indifferent."

In *In re Ducker*, 134 Fed. 43, at page 47, it was held:

> "He [the trustee] is not, in fact, more representative of one creditor or claimant than another."

The claimant dealing with the trustee in bankruptcy, his own representative, ordinarily would not hold himself up to or expect to be held up to the observance of technicalities, however fitting and proper they may be in dealings between adversaries.

The courts, recognizing the nature of bankruptcy proceedings and of the filing of a proof of claim, have not required the claimant in bankruptcy proceedings to observe technicalities. This being so, how can it be argued with reason that failure to join the trustee as a party in connection with the filing of the claim renders such filing of the claim invalid?

It has been repeatedly held that it is sufficient to constitute a proper filing of a claim within the limit of time in which claims must be filed, if the trustee within such time gains knowledge that there is such a claim.

In *Scottsville National Bank* v. *Gilmer* (C. C. A. 4), 37 F. (2d) 227, the schedules filed showed that the bankrupt was indebted to the Scottsville Bank in the amount of $7,335. Correspondence of the trustee with the bank indicated that the trustee considered the bank a creditor. No proof of claim had been filed by the bank, however

The bank was allowed to file a proof of claim after the expiration of the time for filing, the Court holding (p. 229):

> "* * * the trend of modern decisions is uniformly toward the greatest liberality in the allowance of the filing of amended proofs of claim, where there is anything in the record to justify such course of action. It would be harsh and inequitable to refuse the relief upon the statements of facts above recited if there were power to grant it."

In *Matter of Kessler* (C. C. A. 2), 184 Fed. 51, certain Paris bankers in an assignment for the benefit of creditors sent to the assignee an account with an accompanying letter showing a balance due them. In the account rendered "there was no verification under oath nor any statement of consideration" (p. 52) necessary to a proof of claim. The account was turned over subsequently to the receiver and to the trustee in bankruptcy. An attorney, at the request of an American representative of the bankers, called upon the receiver and was assured that the claim had been received from the assignee. The Court held that this constituted a filing of a proof of claim and an amendment was allowed.

In re Salvator Brewing Co. (D. C. N. Y.) 188 Fed. 522, held that the evidence given in proceedings in connection with a claim to certain security for notes paid by the directors of a company as endorsers, amounted to proof of the endorsers' claim against the bankrupt estate.

See also *Hutchinson v. Otis*, 115 Fed. 937 (affd. 190 U. S. 552), and *Bennett v. American Credit Indemnity Co.* (C. C. A. 6), 159 Fed. 624.

The test in each case is whether or not within the time for filing of claims the trustee has gained knowledge of the existence of the claim.

Under the provisions of the Bankruptcy Act claims may be filed by an agent.

Section 1 (9) of the Bankruptcy Act states that the term "creditor" as used in that Act "may include his duly authorized agent, attorney, or proxy." General Order 21 (1) provides that when a proof of claim is made by an agent, "it shall state the reason the proof is not made by the claimant in person." Courts, however, have recognized claims filed by parties who have not been formally authorized to file a claim in behalf of the real owner.

An executor, a partner in a bankrupt firm, refused to file a claim for the estate against that firm. The court held that the legatees had a right to file the claim against the bankrupt firm for their respective interests under the will. *In re Lough* (C. C. A. 2), 182 Fed. 961.

A petitioning creditor, one Veler, filed as agent for one James. There was some question as to whether Huffman or James was the real owner of the note which evidenced the indebtedness. The Court held:

> "The fact that Veler, one of the petitioning creditors, held the legal title to his note merely as agent or trustee for James, is not important, in any aspect now involved. * * * Whether Veler held this as agent and trustee for James, or for Huffman, was a matter of no concern to anyone except James and Huffman. * * * Under these conditions, we think it is clear that Veler must be considered a competent and qualified petitioning creditor, and that no fraud or misleading of the court, affecting its original jurisdiction in the bankruptcy matter, can be predicated upon the fact that Veler was acting for some one else." *In re Veler* (C. C. A. 6), 249 Fed. 633, 637.

A seller of land was allowed to prove his debt for the price agreed to be paid even though he had not yet conveyed the title. The court held that "courts of bankruptcy, for the purposes of bankruptcy, including the allowance of claims, have jurisdiction in equity as well as at law, 11 U. S. C. A. § 11, and may allow debts cognizable only in equity." *Burns Mortgage Co.* v. *Bond Realty Corporation* (C. C. A. 5), 47 F. (2d) 985, 987.

In view of the fact that a valid proof of claim has been filed, petitioner submits that if the District Court deemed it advisable or necessary to join the trustee of St. Louis Southwestern, that Court should have granted the request that he be permitted to do so.

3. Respondents state (p. 24) that as a common stockholder whose interest will be wiped out by the plan of reorganization of St. Louis Southwestern, petitioner has no personal interest to serve at the present time, and therefore no amendment of the claim ought to be permitted.

The record shows that petitioner, in addition to his stockholdings, is the owner of First Terminal & Unifying 5% bonds and General & Refunding 5% bonds of St. Louis Southwestern (R. 14-15). If the Commission's present plan of reorganization of St. Louis Southwestern is put into effect, all classes of bondholders will receive both bonds and stock in the new company.

The report and supplemental report of the Interstate Commerce Commission embodying the present plan were rendered June 30, 1941, and March 9, 1942, respectively.

As appears from the Annual Reports of the St. Louis Southwestern, its net income (after fixed charges in the amount of about $3,000,000) for the following years was as follows: *1941*, $4,472,048; *1942*, $5,673,577; *1943*, $7,543,273; *1944*, $8,119,085; and for the first nine months of 1945,* $6,507,850. In terms of earnings per share of common stock, the figures for these years* were as follows: *1941*, $20.23; *1942*, $27.23; *1943*, $38.10; *1944*, $41.45; and for the first nine months of 1945, $33.52.

The Circuit Court of Appeals for the Eighth Circuit has still to pass upon the present plan of reorganization

* Figures from Moody's Railroads published by Moody's Investors Service.

of St. Louis Southwestern. In view of the extraordinary earnings of the property, despite the reports of the Commission, the stockholders of St. Louis Southwestern may not be deprived of their stock, as is assumed by respondents.

4. Respondents argue (p. 25) that not only is petitioner's corporation, St. Louis Southwestern, in reorganization and the St. Louis Southwestern reorganization court has exclusive jurisdiction, but also that the Rock Island is in reorganization and the Rock Island reorganization court has exclusive jurisdiction. They contend that a party who files a claim in a bankruptcy proceeding has to receive leave of the court to do so. For this strange doctrine they cite *Barton* v. *Barbour*, 104 U. S. 126, 128, and *Porter* v. *Sabin*, 149 U. S. 473, 479, both of which cases involve plenary suits and not claims filed by creditors in bankruptcy or receivership proceedings.

Conclusion

For all of the reasons urged in petitioner's main brief and in this reply brief, the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the cause remanded to that Court with appropriate instructions.

Respectfully submitted,

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Dated January 2, 1946.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 372392

IN THE MATTER OF:
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

DEBTOR.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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OCTOBER TERM, 1945.

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported at 149 Fed. (2) 529, Advance Sheet of August 6, 1945. The opinion likewise appears at pages 61-65 of the Transcript of Record; the judgment, entered June 6, 1945, appears at page 66 thereof.

The Jurisdiction of This Court.

For the reasons particularly stated in the subsequent argument, respondents contend that petitioner has presented no ground for the exercise of jurisdiction by this Court.

Statement of the Case.

Petitioner filed, on April 26, 1934, a proof of claim against The Chicago, Rock Island and Pacific Railway Company "as a stockholder of St. Louis Southwestern Railway Company in behalf of St. Louis Southwestern Railway Company". (R. 2-7.) The gravamen of the claim is that The Chicago, Rock Island and Pacific Railway Company (hereinafter referred to as the "Rock Island") participated in a conspiracy with Edwin Gould and certain stockholders of St. Louis Southwestern "whose identity is unknown to deponent" (petitioner); these conspirators, through control of St. Louis Southwestern stock ownership, joined with other conspirators, and through their stock ownership controlled St. Louis Southwestern in the interest of the conspirators and without regard to the interests of St. Louis Southwestern and its stockholders. The damages are claimed in the aggregate amount of $31,593,874.

Respondents filed their objection to allowance of claim. (R. 7, 8, 9, 10.) One of the objections (R. 8) was that the St. Louis Southwestern filed its petition for reorganization under Section 77 of the Bankruptcy Act in the U. S. District Court for the Eastern Division of Missouri on September 12, 1935, and that on January 4, 1936, the court appointed a trustee; that the effect of this action was to vest in the trustee all causes of action vested in or belonging to St. Louis Southwestern, and that by reason thereof,

the claimant, Walter E. Meyer, could no longer maintain or assert his claim in the Rock Island proceeding. This objection, among others, was sustained by the Special Master. (R. 34-44, also 44-47.) Thereafter, the court heard claimant's objections to the Special Master's reports, and by order entered February 7, 1944 approved the same and disallowed the claim. The court specifically found that claimant had no right to prosecute the cause of action set forth in the proof of claim on the ground that under the provisions of the Bankruptcy Act all rights of action on behalf of the debtor corporation are vested in the trustee, subject to control of the bankruptcy court. (R. 49-52.)

The Circuit Court of Appeals held that where a stockholder sues to enforce a cause of action in favor of the corporation arising from failure of the directors of the corporation to perform their duty in that behalf, and a trustee in bankruptcy is appointed by a court of competent jurisdiction, the right to enforce a cause of action and all other rights of property of the debtor corporation vest in the trustee, and the trustee alone is the proper party to maintain suits for recovery of money due the debtor corporation.

SUMMARY OF THE ARGUMENT.

I.

The provisions of Section 77(a), 77(c)(2) and 77(c)(9) are plain and unambiguous. The decision of the Circuit Court of Appeals gave proper effect thereto and there is no occasion for a reconsideration by this Court.

II.

The decision of the Circuit Court of Appeals is not in conflict with applicable decisions of this Court.

III.

The decision of the Circuit Court of Appeals is not in conflict with decisions of other Circuit Courts of Appeal on the same subject matter.

IV.

Petitioner's "special reason" why the decision should be reversed, *i. e.*, that the claim constitutes a *valuable asset* of St. Louis Southwestern is not valid for the reason that the matters set forth in the claim have heretofore been examined by the Interstate Commerce Commission and by the District Court in the St. Louis Southwestern bankruptcy proceedings and found to be without merit. The results of those examinations are found in *St. Louis Southwestern Railway Company Reorganization*, 249 I. C. C. 5, at pp. 46-149, and 252 I. C. C. 325, at pp. 330-338; and *In Re St. Louis Southwestern Railway Company*, 53 Fed. Supp. 914, at pp. 924-927.

ARGUMENT.

I.

The Provisions of Section 77(a), 77(c)(2) and 77(c)(9) Are Plain and Unambiguous. The Decision of the Circuit Court of Appeals Gave Proper Effect Thereto and There Is No Occasion for a Reconsideration by This Court.

As pointed out by this Court in *Continental Bank* v. *Rock Island Railway*, 294 U. S. 648, Section 77 was another advanced step in the direction of liberalizing the law on the subject of bankruptcies; it added railroad corporations to the category of those who might have relief by legislation enacted under the bankruptcy clause of the Constitution. We must presume that the new statute on a subject-matter both novel and important was carefully drafted and that its clearly expressed provisions mean what they say. Hence, when Congress provided that the Court "shall have exclusive jurisdiction of the debtor and its property wherever located" and that the trustee or trustees "shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of the trustee appointed pursuant to Section 72 or any other section of this title" it meant what that language plainly imports. If St. Louis Southwestern had a cause of action for damages against alleged conspirators prior to the filing of its petition under Section 77, the cause of action was an asset of that company; and upon filing and approval of the petition that asset, like all other assets of the debtor, passed under the exclusive jurisdiction of the court; and when a trustee was appointed, title to that asset, along with all other assets,

became vested in the trustee subject to the control of the judge. How can the court's jurisdiction (power) be exclusive if it can be exercised in whole or in part by a stockholder? Petitioner's arguments, based on convenience or desirability of independent action by a stockholder and without the knowledge or consent of the bankruptcy court, should be addressed to Congress. The courts, taking the statute as they find it, cannot ignore the exclusive power which Congress has conferred. It must be assumed that the bankruptcy court will do its duty, especially having in mind the provision of 77(c)(9):

> "(9) The judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation."

It appears that the court in the *St. Louis Southwestern* case entered an order on February 24, 1936, in response to the above-quoted provision and that the trustee thereafter filed his report in compliance with said order. *In Re St. Louis Southwestern Ry. Co.*, 53 Fed. 914, 926. In his report herein, the Special Master found that the District Court of Missouri had not authorized petitioner to prosecute the claim, nor has that court or its trustee adopted the claim. (R. 36.) Petitioner accordingly is driven to the position that his right to prosecute the claim is unimpaired because "said trustee had made no step whatsoever to take over the claim or to enjoin its prosecution by petitioner." We submit that the trustee's inaction conferred no right upon petitioner nor allowed him to appropriate any of the court's exclusive jurisdiction.

Petitioner cites cases for his proposition that a stockholder is not precluded from continuing to prosecute a cause

of action on behalf of his corporation by reason of the subsequent filing of a petition by, and the appointment of a trustee for, his railroad, where said trustee neither takes over or restrains the prosecution of the claim. These cases were considered by the Circuit Court of Appeals, which examined them all and discussed some of them at length. It found them all either inapplicable or distinguishable on the facts.

Petitioner argues that 77(l) has an effect of some kind upon the "exclusive jurisdiction" provisions of subsection (a):

> "(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

We are unable to perceive how subsection (l) in any wise affects the provisions of subsection (a), even though it were admitted (which we do not) that petitioner's right to prosecute a stockholder's derivative action in favor of his corporation prior to the filing of its petition was a right "with respect to the debtor and its property". It is not the *petitioner's* right that was being pursued by him, but the right of the corporation on whose behalf he purported to act.

We call this Court's attention to Section 57 of the Bankruptcy Act as amended June 22, 1938 (c. 575, sec. 1, 52 Stat. 866, 11 U. S. C. A., sec. 93), par. (m) of which is as follows:

> "(m) The claim of any estate which is being administered in bankruptcy against any like estate may be proved and filed by the receiver or trustee and al-

lowed by the court in the same manner and upon like terms as the claims of other creditors."

It would be unnecessary for Congress expressly to confer the privilege on a receiver or trustee if the rest of the world, including stockholders of the debtor whose estate is being thus administered, had such privilege without congressional sanction. What it means, therefore, is that the privilege conferred upon the receiver or trustee of the estate is exclusive.

We call this Court's attention to the order entered by District Judge Moore in the St. Louis Southwestern proceeding on February 28, 1944, a copy of which, under certificate, has been filed with this Court by respondents; the text of the order is set forth as Appendix A hereto. That order was entered upon the oral motion of petitioner herein for an order on the Trustee of St. Louis Southwestern to show cause why an order should not be made permitting petitioner to prosecute his claim against The Chicago, Rock Island and Pacific Railway Company, theretofore filed in the Rock Island reorganization proceedings. Petitioner's said motion was filed after the entry on February 7, 1944 of the order of the District Court in the Rock Island proceedings disallowing the claim. After the appeal herein was perfected, respondents filed their motion in the Circuit Court of Appeals asking leave to supplement the record by making Judge Moore's order a part thereof; the Circuit Court of Appeals did not pass on this motion.

Petitioner's contention to this Court is that he "is not precluded from continuing to prosecute the claim by reason of the subsequent reorganization proceedings of his railroad and the appointment of a trustee therein, there being no action on the part of that trustee to take over or restrain the prosecution of the claim." Nowhere in his petition or brief does he mention Judge Moore's order

denying him permission to prosecute his claim. Certainly, by virtue of Judge Moore's order there is more to the situation than merely the appointment of a trustee for St. Louis Southwestern and non-action by that Trustee to take over or restrain the prosecution of the claim.

Finally, petitioner urges that the decision of the Circuit Court of Appeals is erroneous because:

> "The special reason why a reversal of the decision is important to security holders of many railroads now in reorganization arises out of the fact that one of the purposes of the enactment of Section 77 was to do away with the abuses of receivership proceedings by which too often those legally liable for wrecking the railroads escaped all liability. The decision here in tends to continue such evil. (P. 6; see also p. 24.)

Section 77 was undoubtedly intended to cure certain recognized abuses in the old form of equity receivership proceedings. Section 77 made changes of a fundamental and radically progressive nature. *Continental Bank v. Rock Island Railway*, 294 U. S. 648. An additional trustee who had no prior affiliation with the debtor is required where any trustee is appointed who within one year prior thereto has been an officer, director or employe of the debtor corporation; appointment of any trustee or trustees must be ratified by the Interstate Commerce Commission, and the maximum limits of a trustee's compensation must be approved by the Commission; the judge is required to direct the trustee to reports facts concerning irregularities, fraud, misconduct or mismanagement as a consequence of which the debtor may have a cause of action against any person or corporation; any plan of reorganization must be approved by the Commission, and if dissatisfied with any of the plans presented, the Commission may formulate its own. But according to petitioner, these elaborate provisions and safeguards are incomplete and fail of their

purpose; the "abuses of receivership proceedings" will continue to exist unless individual stockholders are permitted to proceed *ad libitum* on their sole initiative.

Respondents do not have so poor an opinion of Section 77 or of those who administer it.

II.

The Decision of the Circuit Court of Appeals Is Not in Conflict With Applicable Decisions of This Court.

Petitioner cites just two decisions of this Court in support of his ultimate proposition that he had the right to continue to prosecute the claim herein on behalf of St. Louis Southwestern despite the subsequent reorganization proceedings of that company and the appointment of a trustee therein. These are

Thatcher v. *Rockwell*, 105 U. S. 467,
Johnson v. *Collier*, 222 U. S. 538.

The Circuit Court of Appeals found these cases inapplicable or distinguishable on the facts.

In *Thatcher* v. *Rockwell*, Rockwell, the owner of a chose in action against Thatcher, assigned the claim to third persons. More than four months thereafter, Rockwell filed a petition in bankruptcy. The assignees of the chose in action brought suit thereon against Thatcher in the name of the bankrupt, and in that suit a plea was filed by Thatcher to the effect that Rockwell had been adjudicated a bankrupt and an assignee in bankruptcy appointed "to whom the claim in suit passed under operation of the bankrupt law". This court, by Chief Justice Waite, held:

> "An assignment in bankruptcy only transfers to the assignee such property as the bankrupt had when the petition in bankruptcy was filed. If in point of fact the claim in suit had been transferred by the

> bankrupt more than four months before the proceedings in bankruptcy were begun, the assignee in bankruptcy had no interest whatever in the suit that was pending, because, from the time of the transfer the transferees became entitled to the benefit of any recovery that might be had."

In *Johnson* v. *Collier*, a voluntary petitioner in bankruptcy instituted a suit after the filing of the petition, but before adjudication and before appointment of a trustee, to protect the assets of his estate. The utmost that could be claimed for the applicability of this case is that petitioner's right to maintain his claim in the Rock Island proceeding was unimpaired between December 12, 1935, the date on which the petition of St. Louis Southwestern was filed and approved, and January 3, 1936, the date on which the Court appointed the Trustee.

III.

The Decision of the Circuit Court of Appeals Is Not in Conflict With Decisions of Other Circuit Courts of Appeals on the Same Subject Matter.

In its opinion, the Circuit Court of Appeals discussed *In Re Prudence Bonds Corporation*, 75 Fed. (2) 262. That case is an authority against rather than for petitioner's proposition in that it holds that the reorganization court properly stayed the prosecution by a bondholder of his suit against the trustee of the indenture. The appellate court stated that the stay order was merely ancillary and added:

> "Thus we need not rely upon the general grant of jurisdiction over all the bankrupt's property in subdivision (a); although perhaps that, too, would be alone enough."

Thompson v. *Terminal Shares*, 104 Fed. (2) 1 simply holds that the bankruptcy court could not adjudicate in a

summary proceeding a claim asserted by the bankruptcy trustee against owners of property against which the claim was asserted, but that the trustee must resort to a plenary action. That case has no bearing here.

In *M-K-T Trust Co.* v. *German Nat. Bank*, 77 Fed. 117, the Bank, as obligee of fidelity bond, brought suit against the Trust Company and the surety. At the trial, the defendants asked to have the receiver of the Bank, appointed subsequent to the institution of the suit, substituted as plaintiff. The motion was denied. The appellate court said that the motion ought to have been allowed, if made at the instance of the receiver, but that the denial constituted no ground for the reversal of the judgment because the denial did not prejudice the rights of the defendant Trust Company.

Boston Elevated Railway Co. v. *Paul Boynton Co.*, 211 Fed. 812. This was a suit by a tenant for wrongful entry upon and eviction of plaintiff from the leased premises. After suit begun, a receiver was appointed to take possession of all of plaintiff's property and rights of action. The receiver did not ask to intervene in the wrongful detainer suit nor had the defendant moved to have him substituted as plaintiff. All that the appellate court decided on this point was that "We cannot hold the refusal prejudicial error".

Blue Grass Canning Co. v. *Steward*, 175 Fed. 537. Action for damages by the Canning Co. as vendee for breach of contract for the sale of cans. Some of the cans were shipped but refused by the vendee which thereupon attached them in the hands of the railroad carrier, and the action for damages begun. Pending the suit, the Canning Co. was adjudicated a bankrupt. The court allowed the suit to continue in the name of the bankrupt upon the execution of an indemnity bond by one Gunther, a surety

upon the attachment bond. A motion to dismiss the suit because of the plaintiff's bankruptcy was denied. This was on the ground that "The surety upon the attachment bond had a direct interest in the successful prosecution of the suit, and if he was willing to indemnify the bankrupt, was properly allowed to go on with the case for his own protection."

In *United States* v. *Tacoma Oriental S. S. Co.*, 86 Fed. (2) 363, the Steamship Co. was undergoing reorganization under Section 77(b) in the U. S. District Court for the Western District of Washington. The debtor filed a petition in the bankruptcy court alleging sums due it from the United States under contracts for carrying the mails; that it needed this money in order to continue in business but that the Comptroller General of the United States, at the instance of the Shipping Board, was refusing to pay by reason of certain alleged set-offs. An order to show cause was entered against the United States, the Comptroller General, the Secretary of Commerce, the Secretary of the Treasury and the Director of the U. S. Shipping Board. These respondents, all residents of the District of Columbia, challenged the jurisdiction of the court. The appellate Court held that "the act gives no jurisdiction to the trial court to issue its process outside its district in proceedings purely in personam, in which no protection of the debtor's res is involved." This decision states no more than the familiar principle that claims of the debtor against third persons must be enforced by a plenary action in a court of proper jurisdiction over the defendants. The statement quoted in the opinion from *In Re Prudence Bonds Corp., supra*, that Congress did not intend the bankruptcy court in proceedings under Section 77(b) *to take over all litigation* between the debtor and third persons simply means that

the bankruptcy court does not have jurisdiction in summary proceedings, but that defendants, claiming in good faith and under color of title, are entitled to the benefit of federal statutes relating to venue of suits. The Steamship Co. should have sought relief in the courts of the District of Columbia. But the court did not even intimate that a suit in the District could be brought by any one other than the debtor or its trustee. The statement that Congress did not intend the bankruptcy court "to take over all litigation between the debtor and third persons" does not mean that a certain residue of litigation could be conducted by outsiders, but simply that some litigation is left to be conducted by plenary suit in courts of proper jurisdiction where the defendants reside.

Paradise v. Vogtlandische, etc., 99 Fed. (2) 53 was a patent infringement suit against Paradise. Trustees in bankruptcy for plaintiffs were appointed during the pendency of the proceedings; defendants claimed that the suits abated because the trustees were indispensable parties and were not joined. The appellate court held that this contention was without merit because the bankruptcy of the plaintiff in a pending action did not abate the suit and that "If the trustees decline or fail to prosecute the action, the *bankrupt* may continue its prosecution to judgment." Whether a *stockholder* of the bankrupt corporation could prosecute the suit, in the event that neither the corporation nor its trustee did so, was not presented.

Hartford, etc., Co. v. Federal Bond & Mortgage Co., 59 Fed. (2) 950. Suit on a surety bond given by appellant to appellee, as mortgage trustee, to protect the bondholders from mechanic's liens on the mortgaged property. While the action was pending, a receiver was appointed for the Bond & Mortgage Company; appellant moved to abate the action in case the receiver did not intervene.

The motion was denied. The appellate court held this was not error because the ground of the motion, i. e., that appellant might be subjected to another suit on the same cause of action, was not well taken because there was no possible danger in that respect.

All of the foregoing cases are inapplicable here; none of them involved any such right as this petitioner asserts.

IV.

Petitioner's "Special Reason" Why the Decision Should Be Reversed, i. e., That the Claim Constitutes a Valuable Asset of St. Louis Southwestern Is Not Valid for the Reason That the Matters Set Forth in the Claim Have Heretofore Been Examined by the Interstate Commerce Commission and by the District Court in the St. Louis Southwestern Bankruptcy Proceedings and Found to Be Without Merit. The Results of Those Examinations Are Found in St. Louis Southwestern Railway Company Reorganization, 249 I. C. C. 5, at pp. 46-149, and 252 I. C. C. 325, at pp. 330-338; and In re St. Louis Southwestern Railway Company, 53 Fed. Supp. 914, at pp. 924-927.

At page 6 of the petition it is stated,

> "A reversal of the decision is important to St. Louis Southwestern because the claim constitutes a valuable asset of that company."

And again on page 7:

> "In view of the *meritorious and substantial nature* of the claim, if the decision of the Circuit Court of Appeals herein is allowed to stand it will work a grave injustice to St. Louis Southwestern and to the many thousands of its security holders."

Since petitioner thus injects into the discussion the merits of his claim, respondents are entitled to point out that

after repeated presentation to and consideration by two tribunals, both have pronounced petitioner's contentions to be groundless. In its first report and order in *St. Louis Southwestern Plan of Reorganization*, 249 I. C. C. 5, the Interstate Commerce Commission devoted 104 pages, beginning at page 46, to a meticulous examination of petitioner's allegations. The charges against the Rock Island are dealt with under the heading, "Prior Control of Debtor by Rock Island and Kansas City Southern", beginning at page 61, and again under the heading "Rock Island", beginning on page 92. The Commission refused petitioners' request to make the following finding:

> "1. That the Rock Island controlled the debtor from March 12, 1925 to October 14, 1925, in breach of the fiduciary relationship the Rock Island bore to the debtor in violation of the Clayton Act."

Within the statutory period of 60 days thereafter, the Commission issued its supplemental report, 252 I. C. C. 325, upon various petitions for its modification, including a petition by the instant petitioner, who asked for modification and rehearing, or failing such relief, requested a further investigation of the matters he had alleged. After devoting 8 pages of its supplemental report to these requests, the Commission denied all of them. The plan was duly certified to the District Court in which the reorganization was pending. At the hearing thereon, Mr. Meyer appeared and again urged his oft-repeated charges. It is interesting to note that among other requests he made, was the following:

> "Meyer also asks that the reorganization provide for preservation in the hands of the trustee of the alleged causes of action accruing to debtor. In view of the proceedings already undertaken at Meyer's instance, as outlined *infra*, we deem the request likewise without merit."

In his opinion approving the plan, District Judge Moore made an extensive review of the contentions made by Mr.

Meyer throughout the proceedings. *In Re St. Louis Southwestern Railway Company*, 53 Fed. Supp. 914, at pp. 925, 927. Of particular interest is the Court's reference to its order entered in 1936 pursuant to sub-section (e)(9) of Section 77, which requires the Judge to direct the Trustee to report facts pertaining to irregularities, fraud, misconduct or mismanagement, "as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation". In compliance with the order, the Trustee made various reports from time to time during the period February 24, 1937 to March 7, 1943. Judge Moore stated:

> "Examination of these reports shows that the trustee's whole efforts along this line were devoted to investigation of Meyer's charges. The Trustee was never able to find any basis for the institution of legal proceedings in behalf of the debtor against any of the parties accused, and we do not understand that Meyer accuses the trustee of any bad faith or lack of diligence in this respect."

And again,

> "We believe that ample opportunity has been afforded to Mr. Meyer by the Commission and by the Court to present evidence in support of his various allegations and objections, and that the time elapsed during the pendency of these proceedings has afforded ample time for him to fully prepare his case. He has not convinced either this Court or the Commission that his charges are well-founded.

Petitioner has made frequent reference to the dissenting opinion of Chairman Eastman, 249 I. C. C. 177. It is misleading to state that Commissioner Eastman dissented upon the matters now under consideration. As to them, he said:

> "Brooding over this succession of events, I think that Meyer has conjured up conspiracies which go beyond the reasonable probabilities of the situation. Nor do I think that he has proved the diversions of traffic which he believed were made, and I doubt

whether, even if they existed, which I do not assert, they are capable of proof. The evidence on this matter, pro and con, is very confusing to me, perhaps because I have not been able to study it with the greatest of care. Traffic is so affected by a multiplicity of conditions, including droughts, floods, and pestilences, the development or exhaustion of oil fields and the like, changes in the centers and flow of commerce, rate changes, the operating and soliciting abilities of managements, and many other factors, that it is very difficult to arrive at positive conclusions that there have been deliberate efforts to retard or failure to promote the movement of traffic over particular routes. It is for this reason that I do not now favor the continuation by the Commission with its own resources of the inquiry into these matters which Meyer has endeavored to carry on, although I regret that such an investigation was not instituted when he first asked for it."

In the light of the extensive investigations made by the Interstate Commerce Commission, a body peculiarly fitted to consider the subject-matter of the charges and to have an informed judgment thereon, and the investigations made by the Trustee of St. Louis Southwestern, it is apparent that petitioner's claim has no possible asset value to the debtor. We submit that respondents should not be put to the time, trouble and expense of a hearing involving a subject which has already been so thoroughly threshed out.

Conclusion.

For the reasons urged, respondents respectfully submit that certiorari should be denied.

Respectfully submitted,

W. F. Peter,
A. B. Enoch,
Counsel for Respondents.
1025 LaSalle Street Station,
Chicago 5, Illinois.

APPENDIX A.

IN THE

DISTRICT COURT OF THE UNITED STATES

EASTERN DIVISION,

EASTERN JUDICIAL DISTRICT OF MISSOURI.

In the Matter of
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Debtor. } No. 8497.

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD.

ORDER

DENYING ORAL MOTION OF WALTER E. MEYER FOR AN ORDER ON BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR, TO SHOW CAUSE WHY AN ORDER SHOULD NOT BE MADE PERMITTING WALTER E. MEYER TO PROSECUTE A CLAIM FILED BY HIM IN BEHALF OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AGAINST THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, IN THE PROCEEDINGS ENTITLED "IN THE MATTER OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, DEBTOR; IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD, NO. 53209."

Oral motion of Walter E. Meyer for an order on Berryman Henwood, Trustee of the property of the Debtor St.

Louis Southwestern Railway Company, to show cause why an order should not be made and entered permitting said Walter E. Meyer to prosecute the claim filed by him in behalf of St. Louis Southwestern Railway Company on or about April 24, 1934, against the Chicago, Rock Island and Pacific Railway Company, in the District Court of the United States for the Northern District of Illinois, Eastern Division, in the proceedings entitled "In the Matter of The Chicago, Rock Island and Pacific Railway Company, Debtor; In Proceedings for the Reorganization of a Railroad, No. 53209," being presented to the Court with affidavits in support thereof, and the Court having heard counsel on the said motion, and being fully advised in the premises,

It Is Ordered:

That the said motion of Walter E. Meyer be and the same is hereby denied by the Court.

(signed) GEO. H. MOORE,
District Judge.

Dated February 28, 1944.

FILED OCT
DEC 29
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 392

In the Matter of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, as Trustees of The Chicago, Rock Island and Pacific Railway Company,

Respondents.

BRIEF FOR RESPONDENTS

WILLIAM STANLEY,
Counsel for Respondents.

CUMMINGS & STANLEY,
W. F. PETER,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 392

In the Matter of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, as Trustees of The Chicago, Rock Island and Pacific Railway Company,

Respondents

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Circuit Court of Appeals appears in the record at page 61 and is reported in 149 F. 2d 529. The order of the District Court appears in the record at R. 49, and has not been reported.

The merits of petitioner's claim in this case have previously been passed upon by the Interstate Commerce Commission, its reports and orders appearing in *St. Louis*

Southwestern Plan of Reorganization, 249 I. C. C. 5, 46-149; 252 I. C. C. 325, 330-338; and by the District Court of the United States for the Eastern District of Missouri in *In re St. Louis Southwestern Railway Company*, 53 F. Supp. 914, 924-927. Also, the Circuit Court of Appeals for the Second Circuit affirmed a judgment of the U. S. D. C., S. D. N. Y., 11 F. Supp. 937, refusing jurisdiction of a derivative suit brought by petitioner as a stockholder against a large number of defendants (apparently not including respondents or their debtor Chicago, Rock Island & Pac. Ry. Co.) claimed to arise out of the same matters as those involved in the present case *Meyer* v. *Kansas C. So. Ry. Co.* (1936), 84 F. 2d 411. This Court denied certiorari, 299 U. S. 607; No. 510, O. T. 1936.

An order of the District Court of the United States for the Eastern District of Missouri denying petitioner leave to prosecute the instant case in behalf of the St. Louis Southwestern Railway Company is not reported nor does it appear in the record. The papers relating to this order have, however, been supplied to the Court and appear in the appendices to the brief in opposition to the petition for certiorari (p. 19) and in petitioner's reply brief in support of the petition (pp. 17-34).

Jurisdiction

The judgment of the court below was entered June 6, 1945 (R. 66). The petition for writ of certiorari was filed August 31, 1945. The writ was granted October 22, 1945 (R. 70). Petitioner asserts jurisdiction in this Court based on § 240(a) of the Judicial Code (28 U. S. C. § 347(a)).

Questions Presented

1. Whether a stockholder of a railroad company who brings a derivative action on behalf of his corporation has, after a petition for reorganization of his company

has been filed and is pending under § 77 of the Bankruptcy Act, status or standing to continue the suit in the absence of his showing authorization to do so by the reorganization court.

2. Whether such a suit can be continued where the reorganization court has considered and has denied leave to the stockholder to continue the suit.

3. Whether a claim in a railroad reorganization proceeding under § 77 of the Bankruptcy Act, filed by a stockholder on behalf of his corporation, is properly presented where the stockholder fails to make his corporation, or its trustee in bankruptcy thereafter appointed, a party to the proceeding.

4. Whether a person filing a derivative claim in a reorganization proceeding under § 77 of the Bankruptcy Act has standing to continue his championship of the derived claim where the court refuses him leave to proceed further, and no abuse of the court's discretion is shown.

Statutes Involved

The statutes involved are set forth in the appendix.

Statement

Petitioner renews in this Court a series of charges which he has made against The Chicago, Rock Island and Pacific Railway Company and other railroads for nearly twelve years. He does not sue on his own direct behalf, but has brought the various proceedings on behalf of a railroad corporation in which he held a substantial stock interest, The St. Louis Southwestern Railway Company. The instant proceeding is merely one phase of a long history of litigation in which petitioner has engaged in support of his charges of conspiracies involving loss to the stock-

holders of St. Louis Southwestern. To show the present case in its perspective, this statement first sets forth the earlier history, followed by a statement of the present case itself:

Earlier Proceedings

Petitioner became a stockholder in The St. Louis Southwestern Railway Company in 1920 (R. 15), and was a director of that company during 1926-1927, and from June, 1928, until at least April, 1934 (R. 2). A dominating stock interest in St. Louis Southwestern had been acquired in March, 1925, by The Chicago, Rock Island and Pacific Railway Company, and held by it until October, 1925, when, failing approval by the Interstate Commerce Commission, the stock was sold to the Kansas City Southern Railway Company. In 1927, the Interstate Commerce Commission refused to approve the acquisition of control by Kansas City Southern of St. Louis Southwestern and another railway; and Kansas City Southern, in turn, divested itself of the stock, selling it to a syndicate in 1929. In 1930, the stock was sold to the Southern Pacific. This transfer was approved by the Interstate Commerce Commission (R. 17-19). Petitioner, as a director of St. Louis Southwestern, had always favored union of his line with the Southern Pacific System, and did what he could to bring it about. He was dismayed when acquisition of control by Southern Pacific was approved by the Interstate Commerce Commission without requiring that holders of minority stock be given an opportunity to sell at the same price per share that had been paid for the majority stock (R. 25-26).

It is a matter of fair inference from these facts that petitioner's disappointment at this action by the Interstate Commerce Commission thereafter led him to disavow his earlier views and efforts favoring Southern Pacific con-

trol, and even charge Rock Island (of whom respondents are § 77 trustees) with being part of a conspiracy to ruin St. Louis Southwestern—based on the brief ownership by Rock Island of a majority interest in stock of St. Louis Southwestern years earlier (1925). In fact, the Interstate Commerce Commission reiterated its own finding that petitioner's efforts are not founded in good faith on behalf of St. Louis Southwestern, but are founded upon his desire to better his own position at the expense of other stockholders. In *St. Louis S. W. Ry. Co. Reorganization*, 252 I. C. C. 325, 337, it is stated:

> "Petitioner's [Meyer's] point VII is that certain of our findings and a quotation from the debtor's brief should be stricken from our prior report as reflecting on his credibility as a witness. The findings objected to are that his apparent animating purpose had been to obtain from the Southern Pacific a consideration for his stock in excess of the offer made by the Southern Pacific to the debtor's stockholders in *St. Louis S. W. Ry. Co. Control*, 180 I. C. C. 175, * * * These findings are in our view sufficiently supported by the entire record, and the request that they be stricken is denied."

St. Louis Southwestern filed its petition in bankruptcy on December 12, 1935, in the District Court of the United States for the Eastern District of Missouri (R. 24, 8, 11).

As is shown below, about ten months following the initiation of bankruptcy proceedings with respect to Rock Island in 1933, petitioner filed a derivative claim on behalf of St. Louis Southwestern in the Rock Island proceedings —over a year prior to the time St. Louis Southwestern itself went into bankruptcy. Petitioner thereafter proceeded with a suit for receivership in the federal district court in New York, again asserting his claims of conspiracy amongst Southern Pacific and Kansas City Southern and others (which in the present proceeding he claims were con-

tributed to by Rock Island), and praying the appointment of a receiver to assert the demand for damages on behalf of St. Louis Southwestern. The petition was dismissed by the district court for want of jurisdiction (11 F. Supp. 937). The judgment was affirmed by the Circuit Court of Appeals for the Second Circuit (84 F. 2d 411), which held that there was no necessity for a receiver in any event since St. Louis Southwestern was undergoing reorganization pursuant to § 77, and the reorganization court had directed the trustee to investigate and report facts pertaining to irregularities, etc., by reason of which the company might have a cause of action. This Court denied a writ of certiorari, 299 U. S. 607; No. 510, O. T. 1936.

Petitioner did not halt at the proceedings in the *Rock Island* case and the application for a receiver in New York. He intervened in the proceedings before the Interstate Commerce Commission concerning the plan of reorganization of St. Louis Southwestern which had been referred to the Commission in accordance with § 77 of the Bankruptcy Act. Before the Interstate Commerce Commission more than 5,000 pages of testimony were taken on the contentions of petitioner which form the basis of his claim in the present proceeding (R. 35). The Commission approved the plan of reorganization on June 30, 1941, and in its order dealt with the claim of petitioner against Rock Island, and found that petitioner had not adduced sufficient evidence of a claim against Rock Island and the other alleged conspirators to justify further investigation; and it found that petitioner and other stockholders of St. Louis Southwestern no longer had an equity and were not entitled to participate in the plan (249 I. C. C. 5, 46-150; 252 I. C. C. 325). The Commission, too, agreeing with the Circuit Court of Appeals for the Second Circuit, expressed the view that petitioner was without standing to bring a derivative suit, and noted that the trustee of

St. Louis Southwestern had been directed to investigate and report to the court any facts pertaining to irregularities and that he had, in fact, reported on such matters (R. 35-36). One Commissioner (Eastman) dissented from the order of the Commission approving the plan for reorganization of St. Louis Southwestern; but he did so on the ground that the plan did not consolidate Southern Pacific and St. Louis Southwestern. Although petitioner has laid great store by Commissioner Eastman's dissenting opinion (R. 15), Commissioner Eastman, while paying polite respect to petitioner's interest and persistence, expressed his belief that petitioner "has conjured up conspiracies which go beyond the reasonable probabilities of the situation" and that petitioner had not proved the diversions of traffic which he believed were made. Although once having favored an investigation of Meyer's (petitioner's) charges, Commissioner Eastman expressed his view that he did not then favor the continuation by the Commission of an inquiry into them.

In the reorganization court, petitioner renewed his charges of conspiracy in the proceeding relating to the approval of the plan of reorganization of St. Louis Southwestern. Here again, petitioner was given a full hearing. The district court found against petitioner's contentions (53 F. Supp. 914, 924-927). The court reviewed the directions it had given to the trustee and the reports made by the trustee in a period of over six years respecting petitioner's charges. The court held, 53 F. Supp. at p. 926:

> "The Trustee was never able to find any basis for the institution of legal proceedings in behalf of the debtor against any of the parties accused, and we do not understand that Meyer [petitioner] accuses the trustee of any bad faith or lack of diligence in this respect."

The court further held, 53 F. Supp. at p. 926:

> "We believe that ample opportunity has been afforded to Mr. Meyer by the Commission and by the Court to present evidence in support of his various allegations and objections, and that the time elapsed during the pendency of these proceedings has afforded ample time for him to fully prepare his case. He has not convinced either this Court or the Commission that his charges are well-founded."

The Present Proceeding

Rock Island, of whom respondents are trustees under § 77 of the Bankruptcy Act, filed its petition in bankruptcy on June 7, 1933, in the District Court of the United States for the Northern District of Illinois (R. 3). On April 26, 1934, petitioner, for himself and other minority stockholders, filed a proof of claim in the Rock Island proceeding on behalf of St. Louis Southwestern, excusing his failure to demand that the board of directors of St. Louis Southwestern file such claim on the ground that the demand would be useless and futile (R. 2-3). The petitioner made the astronomical claim of $31,593,874, on the ground that participation by Rock Island, through its stock ownership in St. Louis Southwestern, as above set forth, for a brief period in 1925, had resulted in a debt of Rock Island to St. Louis Southwestern, consisting of (1) damages directly incurred by St. Louis Southwestern during the time Rock Island owned the stock, in the amount of $1,341,928; (2) sale of the dominant stock interest to Kansas City Southern, thus making possible later actions of the alleged conspirators damaging St. Louis Southwestern in the amount of $27,784,946; and (3) a profit of $2,467,000 alleged to have been realized from Kansas City Southern by Rock Island on the stock over and above the reasonable value of the stock (R. 5).

The case was heard by a master on the question whether petitioner has standing to continue the prosecution of the claim in view of the appointment of a trustee for St. Louis Southwestern. The master reported (R. 34-47) that petitioner lacks standing to prosecute this claim by reason of the fact that exclusive jurisdiction for such purposes had vested in the United States District Court for the Eastern District of Missouri, which has not authorized petitioner to continue the claim; that the reason for prosecution by petitioner of the derivative suit ceased when a trustee was appointed under § 77; and that the claim had not been properly filed in any event, because petitioner had failed to bring before the court either St. Louis Southwestern or its trustee—they being indispensable parties to the maintenance of a derivative suit.

The District Court, on February 7, 1944, affirmed the report of the master and entered an order (R. 49-52) finding that the petitioner has no right to prosecute the cause of action.

Immediately, petitioner moved the court wherein St. Louis Southwestern bankruptcy proceeding was pending for leave to continue prosecution of the claim against Rock Island; and after that court considered the affidavits filed by petitioner in support of his motion, and had heard counsel on it, denied the motion (Appendix to Petitioner's Reply Brief on Certiorari, p. 23; appendix to Respondents' Brief in Opposition, p. 19).

The Circuit Court of Appeals affirmed the District Court (R. 61) on the ground that under § 77(a) exclusive jurisdiction of St. Louis Southwestern and its property had vested in the Missouri district court; and that that court had all the powers which a federal court would have if it had appointed a receiver in equity of the property of a debtor for any purpose. The court found the law established that after a federal court had appointed a receiver,

stockholders could not, without leave of court, maintain a stockholders' derivative suit.

Summary of Argument

The provisions of § 77 of the Bankruptcy Act that the court approving the petition of a railroad for reorganization shall have and may exercise all the powers of a federal court which had appointed a receiver in equity for any purpose, and that the trustees of the debtor shall have all the powers of a trustee appointed in ordinary bankruptcy proceedings, make applicable the rules respecting stockholders' derivative suits which have always been applied in equity and bankruptcy proceedings. The claims advanced by petitioner are rights of St. Louis Southwestern Railway, not of petitioner individually. The reason for a derivative suit fails when a receiver or trustee in bankruptcy is appointed, since the court then controls the corporation's affairs and a hostile board of directors can no longer bar assertion by the corporation (through the trustee or receiver) of its claims. The cases are plain that, upon the appointment of a receiver or trustee in bankruptcy, stockholders and others lose status or standing to prosecute derivative claims on behalf of the insolvent corporation. They are protected through their right to appeal to the court for instructions to require the receiver or trustee to prosecute the action—or, if that shall seem wise, leave themselves to prosecute it.

Petitioner has no standing to prosecute this claim in defiance of the established rule merely because he filed the claim prior to the time his corporation became a § 77 debtor. Petitioner acquired no vested right in the corporation's cause of action; it is and has always been the property of the debtor. Such cases as deal with derivative actions commenced prior to receivership have held that the stockholders' suit must fail upon the appointment of

a receiver, unless the stockholders receive leave of the receivership court to proceed with the action.

While it is established that a stockholder may not, without leave of court, proceed with a derivative action where a receiver of his corporation has been appointed, here there is the further fact that the court of that receiver's appointment has affirmatively denied petitioner leave to prosecute his claim. In the light of the hearings which petitioner has had for more than a decade respecting his claims on behalf of his debtor, including lengthy proceedings in which petitioner participated in the Interstate Commerce Commission and full investigations and consideration of petitioner's charges by the court having jurisdiction of the St. Louis Southwestern proceeding, it cannot be suggested that there was any abuse of discretion in refusing petitioner leave to proceed with this case.

In the present case, petitioner never joined St. Louis-Southwestern, or its trustees when appointed, or in any manner brought them before the court below, in all the many years which followed his filing the claim on behalf of that railway. It is settled that a derivative claim may not be prosecuted in the absence of the corporation which owns it, since the corporation's claim can be determined and the corporation concluded by the judgment only if it is before the court. Accordingly, no proper claim was ever filed and petitioner was properly denied permission further to pursue it. The judgment of the court below must be sustained on this ground, which was relied on by the master and the district court.

Not merely is St. Louis-Southwestern in reorganization, but Rock Island (of whom respondents are trustees) is, too. Petitioner is claiming, but has been denied, leave further to proceed against respondents by the court which appointed them. The settled rule is that a receiver cannot be sued without the consent of the court of his appoint-

ment; and such consent is jurisdictional. The only question inherent in such a situation is whether the district court abused its discretion in denying petitioner leave further to proceed; and in the light of the extensive hearings petitioner has had, no abuse of discretion can be found.

Argument

1. Section 77 of the Bankruptcy Act, as it now reads, provides that if a petition of a railway company for reorganization is approved by a Federal district court, that court shall have "exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose." Subsec. (a). The trustees appointed by the court shall exercise all the powers of a trustee appointed pursuant to ordinary bankruptcy proceedings (section 72), and the powers of an equity receiver—but these powers are expressly provided to be subject to the control or authorization of the judge. Subsec. (c) (2). It is further provided that "the rights and liabilities of creditors, and of all persons with respect to the debtor and its property" shall be the same as if a voluntary petition for adjudication has been filed and a decree of adjudication entered. Subsec. (l). That is to say, after a petition under § 77 is filed and approved, there is placed upon the court responsibility for seeing to the rights of everyone in connection with the debtor and its property.

As originally enacted (Act of March 3, 1933, c. 204, 47 Stat. 1467, 1474), Section 77 provided in subsection (a) merely that when a petition for reorganization is approved, "the court in which such order approving the petition is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive

jurisdiction of the debtor and its property wherever located." In an amendment adopted by Act of August 27, 1935 (c. 774, 49 Stat. 911), the provision just quoted was supplemented by the following additional language:

> "* * * and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Manifestly, this enlarges the jurisdiction previously granted; and in granting such enlarged jurisdiction, Congress expressly had incorporated with respect to railroad reorganization cases the established case law dealing with property of the debtor.[1]

Part of the property of the debtor, St. Louis Southwestern, according to petitioner, is a claim against certain other railroads for bringing the debtor to financial ruin. That right is a right of the debtor—not of petitioner, who is merely a stockholder. *Hawes* v. *Oakland*, 104 U. S. 450; *Porter* v. *Sabin*, 149 U. S. 473, 478; *Swope* v. *Villard* (C. C. S. D. N. Y., 1894), 61 Fed. 417; In re *Swafford Bros. Dry Goods Co.* (W. D. Mo. 1910), 180 Fed. 549, 555; *Kelly* v. *Dolan* (C. C. A. 3d, 1916), 233 Fed. 635, 638.

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[1] In the hearings before the House Committee on the Judiciary with respect to the bill which amended § 77 (Hearings on H. R. 8507, 74th Cong., 1st Sess., p. 141), it was clearly realized that the effect of the amendment was to add to the powers of a bankruptcy court, previously granted the powers of the equity court in equity receiverships. And see the remarks of Mr. Sumners, Chairman of the House Committee, in the debate on the same bill, 79 Cong. Rec. (pt. 12) 13209:

> "There is an effort in this arrangement to combine what is known as the 'general equity' powers of the court and the bankruptcy powers of the court."

While the reports of the committees are silent as to the purpose of the added language, the foregoing confirms its plainly apparent purpose—that of extending the jurisdiction of the equity court to these proceedings.

If petitioner is correct in his contentions as to the rights of St. Louis Southwestern against respondents, then this property of the debtor is within the jurisdiction of the District Court of the United States for the Eastern District of Missouri, which is bound, under the law, to see to the protection of all persons interested in that property. To that court petitioner has always possessed a right of resort. If petitioner be correct as to the debtor's rights that court (originally, or as the result of an appeal[2] to the Circuit Court of Appeals for the Eighth Circuit, or review by this Court if need be) will see that the right of the debtor is vindicated. That court possesses the full facilities of administration of the entire estate throughout the United States, together with the investigatory means and talents of the Interstate Commerce Commission (§ 77 [*l*]), as a basis for determining the substantial nature of petitioner's assertions on the debtor's behalf. If those claims of the debtor have merit, if a recovery is had, that recovery for the debtor will be available for expenses, for bondholders in their turn under their respective contracts, for general creditors, conceivably even for persons of whose class petitioner is one, stockholders.

Petitioner's standing to proceed with claims such as those advanced here is merely derivative—the rights not being a personal or proprietary interest of his, but rather of the debtor in which he held a stock interest, he derived status or standing to sue upon them from the asserted fact that the board of directors of the debtor, before it went into reorganization, would not have authorized the suit against the railway company of which respondents are trustees, even had petitioner asked his board of directors to proceed. But the reason for such proceeding vanishes with the assumption of jurisdiction by the bankruptcy court under § 77.

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[2] See *Klein* v. *Peter* (C. C. A., 8th, 1922), 284 Fed. 797, 800-801.

The bankruptcy court stands in the place of the railroad corporation in reorganization. It not only can, but must, see to the protection of assets of the railroad. Petitioner is protected by the court: "The court is charged with the duty of protecting all security holders of the debtor whose property has been transferred to its jurisdiction. This includes stockholders as well as creditors." *In re Chicago & N. W. Ry. Co.* (C. C. A. 7th, 1941), 121 F. 2d 791, 798. There is no longer a reason for petitioner to champion this asserted property of the railroad.

The case law is consistent throughout on this effect of receivership or bankruptcy on derived actions. Since *Porter* v. *Sabin*, 149 U. S. 473, it has been plainly understood that with receivership, with power and responsibility in the court for seeing to the rights of the receivership corporation, the reason for the rule permitting suits on derived causes of action fails, and the stockholder (or creditor) who asserts the right on behalf of the receivership corporation thereafter looks to the receivership court for vindication of the claim—and not to his own suit or action on its behalf. The stockholder, after receivership, may show to the receivership court every fact which he believes justifies suit. To the extent that he is asserting matters of substance, that court will protect the debtor's rights. To the extent that he is merely venting spleen over his disappointment or "dismay" (R. 25-26); or to the extent that he is officiously intermeddling in the affairs of the debtor—perhaps, as a "striker," in the hope of being so annoying that his claim will be bought off for its nuisance value at a price beyond what other stockholders or creditors might receive[3]—the receivership court will refuse

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[3] "• • • As a result of the filing of the petition in this case, the court, not the stockholders, acquired exclusive dominion and control over the estate. Hence, any strategic position occupied by the stockholders prior to these proceedings vanished once the court invoked its jurisdiction.

him leave to proceed.' But since there is no longer reason for his continuing the suit without respect to the wishes of the corporate officers—whose place is now taken by the court—he has no independent right apart from the express authorization of the court to continue with the suit.

In *Porter* v. *Sabin*, 149 U. S. 473, 479, this Court, holding a stockholders' derivative suit on behalf of their corporation for fraudulent wrongs of officers could not be maintained in the light of the receivership of their corporation, stated:

> "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. *Wiswall* v. *Sampson*, 14 How. 52, 65; *Peale* v. *Phipps*, 14 How. 368, 374; *Booth* v. *Clark*, 17 How. 322, 331; *Union Bank* v. *Kansas City Bank*, 136

Threats by stockholders of the kind here in question are merely threats to the jurisdiction of the court, which jurisdiction these selfsame stockholders invoked for their benefit when they caused the debtor's petition to be filed. Consequently, these claims of the stockholders are, as we have said, entitled to no more dignity than any claim based upon sheer nuisance value." *Case* v. *Los Angeles Lumb. Co.*, 308 U. S. 106, 129-131.

"The Bankruptcy Amendment of 1932 was intended to defeat the efforts of nuisance value makers. They were no more popular with Congress than they had been with the courts. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 129. To both, they were looked upon as parasites. By permitting railroads to reorganize under the Bankruptcy Act, it was hoped their efforts would be frustrated. This was the object of Congress, the purpose of the Amendment, Sec. 77. • • •" In re *Chicago & N. W. Ry. Co.* (C. C. A., 7th, 1942), 126 F. 2d 351, 366.

These principles are particularly apposite here, where it appears from the report of the Interstate Commerce Commission in *St. Louis S. W. Ry. Co. Reorganization*, 252 I. C. C. 325, 337, that petitioner's "animating purpose had been to obtain from the Southern Pacific a consideration for his stock in excess of the offer made by the Southern Pacific to the debtor's [St. Louis Southwestern's] stockholders."

U. S. 223; *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 297.

"It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the those interested in the estate. * * *"

In *Austin* v. *Garard* (C. C. A. 7th, 1932), 61 F. 2d 129, a derivative action by stockholders was dismissed, the court holding:

"* * * Appellants' remedy is not to file a petition and seek relief which is in the nature of a separate bill of complaint. They could, and should, if the facts warrant it, bring to the receiver's and the court's attention, facts which disclose new assets and new choses in action or liabilities for which the receiver might bring suit. If the receiver fails to pursue individuals or companies, or groups of indiyiduals and companies, be they officers or directors of the companies, after its attention has been brought to facts showing such liability, the petitioners' remedy is clear. They may apply to the court and cause the receiver to be removed. While the instant case seems to be one where the misconduct of the officers naturally tends to make the defrauded investor 'see red' and to chafe at delays, the orderly administration of the affairs of the trust will best and most effectively promote the interests of all. No facts indicating any laxity or failure on the part of the receiver to enforce every right existing in favor of the companies are suggested in the record before us."

In *Kelly* v. *Dolan* (C. C. A. 3d, 1916), 233 Fed. 635, 638, a stockholder's derivative suit on behalf of a railroad undergoing receivership was dismissed, the court holding:

> "* * * The Central Company [the railway] is not under the domination of its directors; there is no allegation of mala fide control on their part. On the contrary, the corporation has passed from their control into that of a court of competent jurisdiction, and that court has on application declined to allow the receiver of such company to bring suit against the directors. Such being the case, it is manifest that the right of action of the corporation still remains in the corporation and its receiver, and forms part of the estate which that court is administering. To the present situation we may apply the language of the Supreme Court in *Porter* v. *Sabin*, 149 U. S. 480, namely:
>
> "'the right of action remains part of the estate of the corporation within the exclusive custody and jurisdiction of the state court.'"

The proposition has been repeatedly affirmed both in cases involving equity receiverships and cases involving bankruptcies. *Swope* v. *Villard* (C. C. S. D. N. Y. 1894), 61 Fed. 417; *In re Swofford Bros. Dry Goods Company* (W. D. Mo., 1910), 180 Fed. 549, 553; *Ames* v. *American Tel. & Tel. Co.* (C. C. Mass., 1909), 166 Fed. 820, 822-4; *Klein* v. *Peter* (C. C. A. 8th, 1922), 284 Fed. 797, 799; *Lewis* v. *Council* (E. D. N. Car., 1923), 291 Fed. 148, 156-158; *Reagan* v. *Midland Packing Co.* (C. C. A. 8th, 1925), 8 F. 2d 954; *Lewis* v. *Lilliston* (U. S. App. D. C., 1937), 89 F. 2d 847.

Petitioner's cases do not deal with derivative suits. They are not cases where the reason for the suit had vanished with the coming of receivership or bankruptcy. Thus, it is held that one holding a valid assignment of a claim of the bankrupt against others—that is, one who is the owner of the claim—might persist in his suit, nominally by the bank-

rupt, after the bankruptcy. *Thatcher* v. *Rockwell*, 105 U. S. 467, 470. And where an individual who becomes bankrupt has a personal claim for his exemption, apart from the bankruptcy estate, and no trustee has yet been appointed, he (who has a direct and individual interest which could not otherwise be protected) may sue thereon. *Johnson* v. *Collier*, 222 U. S. 538, 540. Or a bondsman, having a personal and direct interest, may persist in the suit. *In re Prudence Co.* (C. C. A. 2d, 1938, 96 F. 2d, 157, 159. A suit may continue, notwithstanding bankruptcy, if the trustee permits or authorizes it to continue for the benefit of the bankruptcy estate. *Paradise* v. *Vogtlandische M.-F.* (C. C. A. 3d, 1938), 99 F. 2d 53, 55; *Bluegrass Canning Co.* v. *Steward* (C. C. A. 6th 1909), 175 Fed. 537, 543-4. In others of petitioner's cases, the question was one of venue, as to the court wherein the trustee might try a claim on the debtor's behalf. *In re Standard Gas & El. Co.* (C. C. A. 3d, 1939), 119 F. 2d 658, 661; *United States* v. *Tacoma Oriental S. S. Co.* (C. C. A. 9th, 1936), 86 F. 2d 363. In one case, a suit by a pledgee of property in which the debtor claimed an interest was held properly stayed by the bankruptcy court. *In re Prudence Bonds Corp.* (C. C. A. 2d, 1935), 75 F. 2d 262, 263.

As set forth at the outset, Congress has provided in § 77(a) that the bankruptcy court shall have and may exercise all the powers of a Federal court which had appointed a receiver in equity for any purpose, and that the trustee shall have all the powers of a trustee appointed in ordinary bankruptcy proceedings. Since the law with respect to both receivership and bankruptcy has always been plain and explicit that upon such proceedings stockholders lose the right to maintain a derivative action, except upon affirmative consent of the equity court, it was properly con-

cluded below that the suit herein must fail for want of showing authorization to proceed.

2. Petitioner apparently bases his greatest hopes for being permitted to continue his derivative action on the fact that his derivative claim was filed prior to the time his corporation itself became the subject of a reorganization proceeding. While apparently conceding that he might not himself file the claim had the reorganization already occurred, he takes the position that the claim once filed gives him status or standing to proceed, notwithstanding the later petition for reorganization of St. Louis Southwestern.

In petitioner's circumstances there is no reason for holding that a derivative suit commenced before receivership or bankruptcy should be treated in any respect different from one instituted afterwards. There is no case which counsel on either side have found which holds that such a derivative suit commenced before receivership or reorganization may be continued thereafter without leave of the receivership court. True there are cases (not cited by petitioner) such as *Riehle* v. *Margolies*, 279 U. S. 218 (Brandeis, J.) and *Chicago Title & Tr. Co.* v. *Fox Theatres Corp.* (C. C. A. 2d, 1934), 69 F. 2d 60, which hold that notwithstanding receivership a claim *against* a receivership corporation on which suit was instituted by a *creditor* prior to the receivership may be continued thereafter for the sake of liquidating the creditor's claim. Such cases are of a class with those cited by defendant which we have already distinguished above. All such cases, however, go to the rights of the person asserting his own claim, and not to the rights of one whose assertion of claim is derivative merely and belongs to the debtor itself. Petitioner's argument, therefore, reduces to the proposition that in some way he acquired a personal right in the action which vested at or prior to the time the reorganization of his corporation was

undertaken." That is equivalent to an assertion that what originally started as a claim of St. Louis Southwestern has now become the property of petitioner himself. We submit that there is no basis in the law or in reason for such assertion of vested right.

In the cases which have dealt with a derivative claim filed prior to a receivership, the courts have held that the receivership supplanted the rights to sue which the plaintiffs might otherwise have had. In *Adler* v. *Seaman* (C. C. A., 8th, 1920), 266 Fed. 828, 836, where, following a stockholders' derivative suit against the officers and directors of a street railway company for wasting of its assets, a receivership was instituted at the behest of creditors, the court, in holding that the consolidation of the two suits was in error, held:

> "* * * When the receiver was appointed, he acquired, under the broad terms of his appointment, the rights of the corporation to prosecute such character of suit for waste. [*Porter* v. *Sabin* is then stated and quoted.] * * *
>
> "It is thus clear that the receiver in the Adler [creditor's] bill would have been a necessary party to any action such as Seaman [the stockholder] brought, had Seaman commenced his action after appointment of the receiver in the Adler suit. The circumstance that such suit was pending when the Adler receiver was appointed cannot alter or affect this rule. The receiver is not a party to that suit. He can become such only by an order of the court [citing cases], although he might be made so by such an order [citing cases] * * *"

The point was reaffirmed in *Seaman* v. *McCulloch* (C. C. A. 8th, 1925), 8 F. 2d 820, 825-6.

In *Coyle* v. *Skirvin* (C. C. A., 10th, 1942) 124 F. 2d 934, certiorari denied 316 U. S. 673, No. 1050 O. T. 1941, in which the receivership followed the filing of the stock-

holders' derivative suit, it was held that the stockholder's suit must fail, the court stating:

> "It is well settled that where a receiver has been appointed for a corporation he is an indispensable party to a stockholder's derivative action. Such an action should be brought by the receiver; and cannot be maintained against the receiver without the consent of the court which appointed him.
>
> "It follows that the plaintiffs could not maintain the action as a derivative stockholders' suit."

3. Petitioner has never shown to the District Court in this case that he was authorized by the court in which his corporation was undergoing reorganization to maintain this derivative claim. It has been held (*Swope* v. *Villard* [C. C. S. D. N. Y., 1894], 61 Fed. 417, 420):

> "* * * Neglect and dereliction of duty can hardly be charged against a court; especially, in one federal court against another. The refusal of the court to direct suit upon an alleged cause of action would seem rather to prevent a stockholder from suing thereon, than to give occasion for his doing so, unless the court expressly authorized him to sue. [Cites and quotes *Porter* v. *Sabin*]."

It is held that the lack of an allegation showing that the receivership court has permitted the stockholder to assert the derivative action renders the court wherein it is asserted unable to know whether it is, by entertaining the claim, improperly interfering with the court wherein the receivership is pending. *Lewis* v. *Lilliston* (U. S. App. D. C., 1937), 89 F. 2d 847. For failure to show leave of the Missouri district court, this action must fail.

But this case goes even beyond the situation where a litigant fails to show leave of the receivership court to sue on a cause of action of the receivership corporation. Here, after the most painstaking inquiry over a matter of years

by the receivership court and the Interstate Commerce Commission upon petitioner's persistent allegations of conspiracy and wrongdoing on the part of respondents' railroad and other roads, the court wherein the railroad corporation is undergoing reorganization denied his request for leave to continue this claim. See statement *ante*, p. 9. Refusal of leave is a bar to petitioner's further assertion of the claim. *Klein* v. *Peter* (C. C. A., 8th, 1922), 284 Fed. 797, 799, and authorities cited.

Where the receivership court has denied petitioner leave further to prosecute the claim, the only question is whether that court abused its discretion in the circumstances. *Continental Ill. Natl. Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 677; *Guaranty Tr. Co.* v. *Henwood* (C. C. A., 8th, 1936), 86 F. 2d 347, 352. Petitioner's remedy, if the court erred in refusing him leave, is by appeal to the United States Circuit Court of Appeals for the Eighth Circuit. Its action and its discretion cannot be collaterally impeached in this cause. *Grant* v. *A. B. Leach & Co.*, 280 U. S. 351, 359-360.

4. If a stockholder is to bring a derivative action, asserting not his own right but that of his corporation, it is settled that he must join the corporation as a party defendant. He is not permitted the extraordinary right not only to litigate another's cause of action but also to do it in the latter's absence. *Davenport* v. *Dows*, 18 Wall. 626; *Coyle* v. *Skirvin* (C. C. A., 10th, 1942), 124 F. 2d 934, cert. denied, 316 U. S. 673, No. 1050, O. T. 1941; *Adler* v. *Seaman* (C. C. A., 8th, 1920), 266 Fed. 828, 836. Cf. *Price* v. *Gurney*, 324 U. S. 100; *Lewis* v. *Lilliston* (U. S. App. D. C., 1937), 89 F. 2d 847. Here petitioner attempted exactly that.

While this ground of decision of the master and district court was not relied upon by the court of appeals, it can properly be considered by this Court as a ground for

sustaining the judgment below. *Langnes* v. *Green*, 282 U. S. 531, 535-539.

In *Davenport* v. *Dows*, 18 Wall. 626, this Court held:

> "* * * such a suit can only be maintained on the ground that the rights of the corporation are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. * * * a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation. * * *"

The master (R. 36, 43, 45-47), whose report was approved by the district court (R. 52), pointed out that since petitioner failed to bring before the court below either the corporation whose right he was asserting, or its trustee after the petition for reorganization was filed, or the directors whose collusion was alleged to have given rise to the claim, there was really no proper claim before the court. It is now too late to file a claim; time for filing claims expired more than eleven-and-one-half years ago (R. 46). As a common stockholder whose interest will be wiped out by the plan of reorganization of St. Louis Southwestern (R. 46), petitioner has no personal interest to serve at the present time; and therefore no amendment of the claim ought to be permitted (R. 46); cf. *Case* v. *Los Angeles Lumb. Co.*, 308 U. S. 106, 116-119. No abuse of discretion in refusing leave to amend the claim by bringing new claimants and defendants before the court could be shown in this case, where petitioner has litigated this claim at such lengths before the Interstate Commerce Com-

mission, pursuant to the provisions of § 77 of the Bankruptcy Act (R. 46), and the Missouri district court, 53 F. Supp. 914, 925, 927.

5. Not only is petitioner's corporation, St. Louis Southwestern, in reorganization, but the Rock Island of which respondents are trustees is likewise subject to the exclusive jurisdiction of a court of bankruptcy. So far as is concerned, respondents as trustees, the District Court of the United States for the Northern District of Illinois possesses "all the powers * * * which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose" (§ 77[a]). After full consideration of the question whether petitioner might continue with his claim against respondents as trustees, it was held by the court having jurisdiction of the respondents that petitioner might not further prosecute this claim. Petitioner's failure to secure leave of the court effectively bars his right to proceed. *Barton* v. *Barbour*, 104 U. S. 126, 128; *Porter* v. *Sabin*, 149 U. S. 473, 479. Failure to secure leave of court to sue its receiver is jurisdictional, and the action cannot thereafter be maintained. *Merryweather* v. *United States* (C. C. A., 9th, 1926), 12 F. 2d 407; and see *Lewis* v. *Lilliston* (U. S. App. D. C., 1937), 89 F. 2d 847.

In the light of denial to petitioner by the Illinois district court of leave to proceed further against respondents the only question inherent in the case is whether the Illinois district court has abused its discretion. *Continental Ill. Nat. Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 677; *Guaranty Tr. Co.* v. *Henwood* (C. C. A., 8th, 1936), 86 F. 2d 347, 352. No abuse of discretion is shown where petitioner has had protracted hearings on his allegations over the course of many years, and the only effect of further hearings would be even longer delays in the approval of reorganization plans for the Rock Island and for St. Louis Southwestern.

Conclusion

As applied to this case, the wisdom of the rule that a stockholder who does not have consent of the court cannot proceed with a derivative action on behalf of his corporation after it shall have gone into receivership or bankruptcy is more than apparent. Petitioner has persisted more than a decade in litigating his claims of fraud, collusion and conspiracy; he has filled the records of the courts and the Interstate Commerce Commission with the history of his attempts to document his charges; he has caused the trustee of his debtor to make reports—not once, but over years of time—on his charges. Plans for the reorganization of petitioner's debtor, St. Louis Southwestern, and of respondents' debtor, Rock Island, have now respectively reached that stage where petitioner's efforts not only do not help him, but where petitioner is now delaying steps looking to the winding up of the proceedings. As a stockholder of St. Louis Southwestern, petitioner has no remaining interest of his own, but is managing to interfere with the rights of all security holders of that road and of Rock Island who do have an interest in the reorganized corporations—and that despite the fact that the Missouri district court refused him leave to pursue this proceeding. His standing to cause further delay and expense by proceeding further herein was properly denied.

The judgment of the court below should be affirmed.

Respectfully submitted,

WILLIAM STANLEY,
Counsel for Respondents.

CUMMINGS & STANLEY,
W. F. PETER,
Of Counsel.

APPENDIX

Provisions of § 77 of the Bankruptcy Act, as restated in the amendment by Act of August 27, 1935, c. 774, 49 Stat. 911 et seq. (11 U. S. C. § 205).

SEC. 77. REORGANIZATION OF RAILROADS ENGAGED IN INTERSTATE COMMERCE.—

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"). * * * If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. * * *

(c) After approving the petition:

* * * * * * *

(2) * * * The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter

amended, the power to operate the business of the debtor. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

* * * * * * *

(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. * * *

(13) * * * The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. * * *

(*l*) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

SUPREME COURT OF THE UNITED STATES.

No. 392.—October Term, 1945.

Walter E. Meyer, Petitioner,
vs.
Joseph B. Fleming and Aaron Colnon, as Trustees of the Chicago, Rock Island and Pacific Railway Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 4, 1946.

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner is the owner of a substantial number of shares of stock of the St. Louis Southwestern Railway Company. In April 1934 he filed a claim for the benefit of St. Louis Southwestern in the bankruptcy proceedings which previously had been instituted under § 77 of the Bankruptcy Act (49 Stat. 911; 11 U. S. C. § 205) for the reorganization of the Chicago, Rock Island & Pacific Railway Co. The claim filed was a claim for a cause of action which St. Louis Southwestern allegedly had against the Rock Island. It amounted to many millions of dollars and arose out of an alleged conspiracy between the Rock Island and others to control the St. Louis Southwestern to their own interest in breach of their fiduciary relationship to St. Louis Southwestern, and in violation of the antitrust laws. It was stated in the claim that a demand on the board of directors of St. Louis Southwestern to file the claim was not made because it would be futile, the dominant stockholder and the directors of St. Louis Southwestern being parties to the conspiracy. In May 1935 the trustees of Rock Island objected to the claim by general denial. In December 1935—about a year and a half after the claim had been filed—St. Louis Southwestern filed a petition for reorganization under § 77 of the Bankruptcy Act. Shortly thereafter the petition was approved and a trustee was appointed. Thereupon the trustees of Rock Island further objected to the claim filed by petitioner on the ground that all causes of action belonging to St. Louis Southwestern had become vested in its bankruptcy trustee and could no longer be asserted in the Rock Island proceeding by petitioner. The claim

was referred to a special master who, in February 1942, filed his report, concluding that petitioner should not be allowed to prosecute the claim. Two years later the District Court approved the special master's report and disallowed the claim. On appeal the Circuit Court of Appeals affirmed. 149 F. 2d 529. The case is here on a petition for a writ of certiorari which we granted because the problem presented is an important one in bankruptcy law.

The Circuit Court of Appeals held that a stockholders' derivative suit commenced before the corporation's petition under § 77 had been approved could not be continued thereafter without permission of the reorganization court. It relied on the provisions of § 77 which gave the reorganizing court exclusive jurisdiction of the debtor and its property[1] and which give a trustee appointed in those proceedings the title and powers of other bankruptcy trustees.[2] But the exclusive jurisdiction granted the reorganization court by § 77 (a) is that which bankruptcy courts have customarily possessed.[3] And the title and powers of the trustee are by § 77 (e) (2) assimilated to those of trustees in ordinary bankruptcy proceedings. Certainly, so far as the enforcement of

[1] § 77(a) provides in part:

"If the petition is so approved, the court in which such order is entered shall during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district."

§ 77(1) provides:

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

[2] § 77(e)(2) provides in part:

"The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 44 or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding."

[3] Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 737-738; Ex parte Baldwin, 291 U. S. 610, 615; Continental Illinois Nat'l Bank v. Chicago, R. I. & P. Ry. Co., 294 U. S. 648, 682-684; Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483. And see Thompson v. Terminal Shares, Inc., 104 F. 2d 1. Cf. In re Standard Gas & Electric Co., 119 F. 2d 658, 661, arising under § 77B.

claims are concerned, there is no indication that Congress adopted a different rule in proceedings under § 77 than had long obtained in ordinary bankruptcy proceedings. Yet, if the view of the Circuit Court of Appeals were followed, any suit which had been brought by the corporation before its petition under § 77 had been approved would be defeated when that event happened. That is not the rule in ordinary bankruptcy proceedings. And it would be a radical change in the law to write that rule into § 77.

Litigation instituted by a creditor may not be defeated merely by reason of the fact that he has become a bankrupt. *Thatcher v. Rockwell*, 105 U. S. 467, 469-470. Title to the claim vests, of course, in the bankruptcy trustee.[4] He is in position to take control of the litigation. He may, as indicated in *Johnson v. Collier*, 222 U. S. 538, 540, start a new suit[5] and cause the old one to be abated, or intervene in the old one[6] and obtain such benefits as it affords.[7] The choice may indeed be a valuable one. Rights might be lost if the earlier suit were abated. And the speculative nature of the litigation or the expense involved might indicate to the trustee that it was more provident for him not to intervene in the existing suit, nor to institute a new one, but to let the one which had been started run its course.[8] As stated in *Johnson v. Collier*, *supra*, p. 540,

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[4] Sec. 70 of the Bankruptcy Act, 52 Stat. 879, 11 U. S. C. § 110. The same is true under § 77 by reason of the provision in § 77 (c) (2), *supra* note 2.

[5] Sec. 11 (c) of the Bankruptcy Act, 11 U. S. C. § 29 (c), authorizes a receiver or trustee, within two years subsequent to the adjudication or within such further period of time as federal or state law permits, to institute proceedings in behalf of the estate upon any claim against which the statute of limitations had not expired at the time of the filing of the petition in bankruptcy.

This provision is applicable to proceedings under § 77 by reason of § 77 (c) (1), set forth in *supra* note 1.

[6] Sec. 11 (c) of the Bankruptcy Act, 52 Stat. 849, 11 U. S. C. § 29 (c), provides that "A receiver or trustee may, with the approval of the court, be permitted to prosecute as receiver or trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him." This provision is likewise applicable to proceedings under § 77 (c) (1), *supra* note 1.

[7] And see Danciger v. Smith, 276 U. S. 542; Bluegrass Canning Co. v. Steward, 175 F. 537, 543-544; Paradise v. Vogtlandische Maschinen Fabrik, 99 F. 2d 53, 55; Bennett v. Associated Theatres, 247 Mich. 493, 496; Griffin v. Mutual Life Ins. Co., 119 Ga. 664.

[8] If the suit is continued by the bankrupt, the trustee is concluded by the judgment. Eyster v. Gaff, 91 U. S. 521, 524-525; Paradise v. Vogtlandische Maschinen Fabrik, *supra* note 7, p. 55.

"If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some States the more direct interest of creating a fund which may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice."

The same rule obtains in equity receiverships.[10]

We see no reason why there should be a different rule in the case of stockholders' derivative suits. They are likewise suits to enforce a corporate claim. They are one of the remedies which equity designed for those situations where the management through fraud, neglect of duty or other cause declines to take the proper and necessary steps to assert the rights which the corporation has.[11] The stockholders are then allowed to take the initiative and institute the suit which the management should have started had it performed its duty. The corporation is a necessary party *Davenport* v. *Dows*, 18 Wall. 626. Hence, it is joined as a defendant. But it is only nominally a defendant, since any judg-

[9] As stated in Van der Stegen v. Neuss, Hesslein & Co., 270 N. Y. 55, 59-60: "the trustee in bankruptcy is not obliged to maintain or continue every cause of action which the bankrupt may have. He is not bound to accept burdensome property nor unprofitable contracts (*Atchison, T. & S. F. R. Co.* v. *Hurley*, 153 Fed. Rep. 503; affd. 213 U. S. 126), nor is he obliged to intervene in any action pending by or against the bankrupt. (*Kessler* v. *Herklotz*, 132 App. Div. 278; *Fleming* v. *Courtenay*, 98 Me. 401. If a trustee does not take up the prosecution of a suit the defendant is not released even where the right of action is one that might have passed to the trustee. The bankrupt may continue the prosecution of the action. (*Griffin* v. *Mutual Life Ins. Co.*, 119 Ga. 664.) The relationship, therefore, between the bankrupt and his trustee is for one and the same purpose—to get out of the bankrupt's property and claims enough money to pay his debts and to relieve the bankrupt, through his discharge, from further responsibility."

[10] See Missouri, K. & T. Trust Co. v. German Nat'l Bank, 77 F. 117, 122-123; Boston Elevated Ry. Co. v. Paul Boynton Co., 211 F. 812, 822-823; Hartford Accident & Indemnity Co. v. Federal Bond & Mortgage Co., 58 F. 2d 950, 956. See 1 Clark on Receivers (2d ed., 1929) §§ 614, 615.

[11] Glenn, The Stockholder's Suit, 33 Yale L. Journ. 580.

ment obtained against the real defendant runs in its favor. The reasons of policy for holding that ordinary suits to enforce a corporate claim are not abated when the corporation is adjudged a bankrupt or when a receiver is appointed are equally applicable here. The claim sought to be enforced in a derivative suit may be an important asset of the estate. It might be lost to the estate through the operation of statutes of limitations, if the trustee or receiver were required to start anew. As in case of ordinary suits to enforce corporate claims, he should be allowed a choice to let the suit continue under the stockholders' auspices;[12] to intervene in it;[13] to start a new suit; or, in case he deems it more provident from the point of view of the estate to make a settlement of the claim or to reserve it for the reorganized company, to cause it to be abated.[14] He might conclude that the more provident course was to let the suit continue without interference.[15] That decision might be dictated by the speculative nature of the suit and the expense involved as *Johnson* v. *Collier*, *supra*, indicates. If the trustee will not sue and the stockholder cannot continue with the litigation, what might turn out to be a valuable claim might be lost to the estate not only through the operation of statutes of limitation, but in cases like the present through a discharge of the debtor.[16] The point is that the trustee or receiver, being in a position to take control of the litigation by reason of the fact that the cause of action has become a part of the estate, should have the opportunity to make the choice which is most advantageous to the estate. Cf. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483. The fact that the corporation is nominally a defendant should not lead to any different result.[17] That gives the suit only a difference in form, not a difference in substance.

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[12] Cf. American Steel Foundries v. Chicago, R. I. & P. Ry. Co., 231 F. 1003; Seagrist v. Reid, 171 App. Div. 755, 759. And see 4 Cook on Corporations (8th ed. 1923) § 748.

[13] Meyer v. Page, 172 App. Div. 625, 627; Floyd v. Layton, 172 N. C. 64.

[14] Moreover, the stockholder's suit might so intimately affect the administration of the bankruptcy or receivership estate as to require that it be continued only under the auspices of the trustee or receiver. See Adler v. Seaman, 266 F. 828, 835-837; Seaman v. McCulloch, 8 F. 2d 820, 825-826.

[15] In re National Republic Co., 109 F. 2d 167, 171; McAnarney v. Lembeck, 97 N. J. Eq. 361.

[16] Sec. 77(f) provides for the discharge of the debtor "from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved."

[17] But see Coyle v. Skirvin, 124 F. 2d 934, 937-938 (receivership). The provision in § 77(j) empowering the court to "enjoin or stay the com-

We have in the present case not a stockholders' derivative suit filed before the bankruptcy of his corporation, but a claim filed in the bankruptcy proceedings of the alleged debtor (Rock Island) by a stockholder on behalf of his corporation, St. Louis Southwestern. If the claim were to be filed after the petition for the reorganization of St. Louis Southwestern had been approved, it could be done only with the consent of the bankruptcy court. For it has exclusive authority to determine how causes of action which have become a part of the bankruptcy estate shall be enforced. See *Porter* v. *Sabin*, 149 U. S. 473; *Klein* v. *Pate*, 284 Fed. 797. But since the claim was filed before the petition of St. Louis Southwestern under § 77 had been approved, no reason is apparent why that event should have a different effect on the claim than it would have had on a suit which had been previously instituted by or on behalf of the corporation. Indeed, the facts of this case emphasize the reason for giving the trustee an opportunity to choose what course to take. The claim was filed in April 1934, a year and a half prior to the time when the petition of St. Louis Southwestern under § 77 had been approved. We are told that the time for filing of claims against the Rock Island expired over eleven years ago. If the claim were now disallowed, the trustee of St. Louis Southwestern, if he desired to assert it, would be faced with the task of obtaining leave to file out of time.[18] There is, therefore, the same reason for allowing the estate to obtain the benefits of the claim which has been filed, as there would be for allowing the trustee the opportunity to take over a stockholders' derivative suit previously instituted.

It is said, however, that the claim was properly disallowed because the corporation on whose behalf the claim was filed was not

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mencement or continuation of suits against the debtor until after final decree" obviously relates to suits where claims are asserted against the debtor, not where the debtor is made a nominal defendant for the purpose of obtaining a judgment in its favor.

[18] Sec. 77(c)(7) provides that the judge "shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown." This is the equity rule (5 Collier on Bankruptcy (1944) p. 537) which permits the filing of claims out of time provided the claim is equitable, the claimant is not chargeable with laches, and the assets have not been distributed (see Conklin v. United States Shipbuilding Co., 136 Fed. 1006, 1009-1010; Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 740-742); and provided further that the late filing does not unduly delay the proceedings. Guaranty Trust Co. v. Henwood, 86 F. 2d 347, 353.

before the court. As we have said, the corporation is a necessary party in a stockholders' derivative suit. *Davenport* v. *Dows*, *supra*. It can be joined as a party and brought in by summons in the usual way. But the filing of a claim in bankruptcy is not the institution of a plenary suit. It is a claim against assets in the hands of the bankruptcy court, not an action *in personam*. The absence of the corporation is a proper basis for an objection to the claim. But there is no way available to the stockholder to join it in the claim other than by moving the bankruptcy court to bring it in. The bankruptcy court has that power.[19] The objections to the present claim, however, were not based on the absence before the court of St. Louis Southwestern or its trustee.[20] But whether such an objection was made or not, the proper and necessary procedure for the bankruptcy court is to summon in the corporation or its trustee so that all parties will be bound by any order which is entered on the merits.[21]

It is said, however, that by reason of events which have transpired since St. Louis Southwestern filed its petition for reorganization under § 77, the claim which Meyer filed in the Rock Island reorganization proceedings was properly disallowed. In the first place, it appears that a reorganization plan for the St. Louis Southwestern has been approved by the District Court. *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914. The Interstate Commerce Commission in preparing the plan investigated Meyer's charges and concluded that they had no substantial support. *St. Louis Southwestern Ry. Co. Reorganization*, 249 I. C. C. 5, 46-149; 252 I. C. C. 325, 330-337. It refused to recommend that the cause of action be reserved in the plan of reorganization. 252 I. C. C. pp. 334-335. The District Court concurred in that recommendation (53 F. Supp. p. 925), saying that the trustee had investigated the charges, found no basis for instituting legal proceed-

[19] Sec. 2(a)(6) of the Bankruptcy Act, 11 U. S. C. 511(a)(6), grants the court power to "Bring in and substitute additional persons or parties in proceedings under this Title when necessary for the complete determination of a matter in controversy." See 1 Collier on Bankruptcy (14 ed. 1940), pp. 214-218.

[20] One of the grounds on which the Special Master based his recommendation for disallowance of the claim was that the claim was improperly filed in the first instance since the corporation was not made a party. But the District Court, like the Circuit Court of Appeals, proceeded on the ground that the claim could no longer be prosecuted after approval of the petition for the reorganization of St. Louis Southwestern unless the bankruptcy court in that proceeding expressly authorized it.

[21] Cf. 14 Boston Univ. L. Rev. 802, 808.

ings on behalf of St. Louis Southwestern, and that there was no charge that the trustee had acted in bad faith or had shown a lack of diligence. 53 F. Supp. 926. Moreover, we were advised on oral argument, although the matter does not appear of record, that a motion of Meyer in the St. Louis Southwestern proceedings for an order directed to the trustee to show cause why Meyer should not be permitted to prosecute the claim filed by him in the Rock Island proceedings was denied in February 1944. The grounds of this denial do not appear. We can infer, on the basis of the opinion of the District Court confirming the plan, that the motion was denied because the court was of the view that the claim had no substance. But a decision of the court not to direct or authorize its trustee to undertake the prosecution of a claim is one thing; the problem presented here is quite a different one. While the court might not deem it provident to have the estate assume that burden, the continuation of the prosecution of the claim by Meyer might be wholly compatible with the disposition of the claim by the reorganization court or with the administration of the estate. It is not apparent in this case that there would be any such inconsistency in view of the fact that the plan makes no provision for the claim. As stated in *Johnson* v. *Collier*, *supra*, p. 540, "If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability."

The order disallowing the claim will be reversed. On remand of the cause the District Court will allow the claim to be amended by joining St. Louis Southwestern or its trustee. If it is established that the continued prosecution of the claim will be inconsistent with the plan of reorganization of St. Louis Southwestern or the administration of its affairs, the claim should be disallowed. If it is not so established, the claim should then be considered on its merits.

So ordered.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON took no part in the consideration or decision of this case.